FILED
AUG 27 1992
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-327 / 91-690

STATE OF IOWA,

Appellee,

vs.

EARL CLARENCE HARRIS,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, L. D. Lybbert, Judge.

Defendant appeals his conviction, following a jury trial, for first-degree burglary, possession of cocaine with intent to deliver, and second-degree kidnapping.

AFFIRMED.

John P. Messina, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Richard J. Bennett, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Ray Walton, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

In January of 1989 the defendant, Earl Harris, and his accomplice, Derrick Holmes, discovered a large quantity of cocaine had been stolen from them. Believing the thief to be David Puckett, the defendant drove to Puckett's home. After Puckett voluntarily left with Harris, they picked up Holmes. The three returned to Puckett's home where an assaultive confrontation occurred. Holmes threatened Puckett and struck him with a gun. Harris and Holmes demanded to know the location of the cocaine.

Puckett, in an apparent attempt to feign innocence, led Harris and Holmes on a search that eventually ended at the apartment of Brian Williams. After Harris and Holmes forcibly entered the apartment and found no one at home, Puckett turned over the cocaine. While no assault took place in the apartment, Puckett had been assaulted on numerous occasions and threatened with injury or death during the search. Puckett was also forced to remain with Harris and Holmes. After leaving Williams' home, Puckett was taken to the home of defendant's girlfriend, where he was bound and gagged. Puckett later escaped.

On October 30, 1989, Holmes and Harris were charged with (1) first-degree burglary, (2) possession of cocaine with intent to deliver, and (3) second-degree kidnapping. Holmes' trial was severed.

Prior to trial, defense counsel made some comments to the court pertaining to the lack of prospective black

jurors. While no specific objection was made, the trial judge stated any objections on these grounds would be overruled. A jury found Harris guilty on all three counts on January 10, 1991.

During posttrial proceedings, defense counsel made a specific sixth amendment challenge to the lack of blacks in the venire. The challenge was denied. Harris then took this appeal.

Harris challenges the district court's denial of his motions for judgment of acquittal on the burglary and kidnapping charges. He contends there is not sufficient evidence to support the charges. Harris's ineffective assistance of counsel claim arises from the failure of trial counsel to make a specific objection to the lack of blacks in the venire prior to the rendering of the verdict. In the alternative, Harris argues error was preserved by trial counsel's sixth amendment challenge in the posttrial proceedings.

Our scope of review is for the correction of errors. Iowa R. App. P. 4. We are bound by findings of fact if they are supported by substantial evidence. Iowa R. App. P. 14(f)(1).

When considering a challenge to the sufficiency of evidence we view the evidence in a light most favorable to the State and accept all reasonable inferences tending to support the conviction as established. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981); State v. Schertz, 328

N.W.2d 320, 321 (Iowa 1982). The issue is whether substantial evidence in the record supports the charges against Harris. Schrier, 300 N.W.2d at 306. Evidence is substantial if it could convince a rational fact finder the defendant is guilty beyond a reasonable doubt. See State v. LaPointe, 418 N.W.2d 49, 51 (Iowa 1988) (citing State v. Hall, 287 N.W.2d 564, 565 (Iowa 1980)).

I. Acquittal on Burglary Charge.

Iowa Code section 713.1 defines burglary: "[a]ny person, having the intent to commit a felony, assault or theft therein, who, having no right . . . to do so, attempts to enter an occupied structure, . . . commits burglary." Iowa Code § 713.1 (1991) (emphasis added).

The burglary charge against Harris was submitted to the jury with alternative intent elements: intent to commit assault, intent to possess and deliver cocaine, and intent to kidnap. The element of intent in burglary is seldom susceptible to direct proof, and necessarily it may be shown by circumstantial evidence. State v. Olson, 373 N.W.2d 135, 136 (Iowa 1985) (citing State v. Furlong, 216 Iowa 428, 432, 249 N.W.2d 132, 134 (1933)). Direct and circumstantial evidence are equally probative in establishing this requirement. Iowa R. App. P. 14(f)(16). Iowa law clearly recognizes "[i]ntent is rarely capable of direct proof and must usually be shown by circumstantial evidence." State v. Delay, 320 N.W.2d 831, 835 (Iowa 1982) (citing State v. Morelock, 164 N.W.2d 819, 822 (Iowa

1969)). Given criminal intent is rarely susceptible to direct proof, the fact finder may determine intent by such reasonable inferences and deductions as may be drawn from facts proven by evidence. State v. Serr, 322 N.W.2d 96, 101 (Iowa App. 1982). In the case of burglary, intent can be gathered from what a defendant later said and from violent conduct that followed the entry. See State v. Franklin, 368 N.W.2d 716, 719 (Iowa 1985).

A. Intent to Commit an Assault.

Harris contends the State failed to present sufficient evidence to prove he intended to commit an assault after breaking and entering Williams' apartment. Under Iowa Code section 708.1, an assault may occur by either an act that was intended to place a person in fear of immediate physical contact or an act that was intended to result in the physical touching of the person in an offensive or insulting manner. Iowa Code § 708.1 (1991).

Although the victim apparently was not physically touched in Williams' home, the facts reveal the victim was continually threatened with injury or death and assaulted several times before and after the burglary. During the burglary the defendant acted in an intimidating and violent manner by smashing household items. After the burglary, the defendant took the victim to another location where he tied up and left the victim. In addition, the defendant's accomplice had a gun in his possession, which was pointed at the victim and used to strike the victim. There was

also testimony the victim was bleeding as a result of the injuries inflicted by the defendant.

B. Intent to Commit a Felony.

Harris claims he did not have the requisite intent to commit the felony of possession of illegal drugs with intent to deliver or the felony of kidnapping. Evidence shows the cocaine belonged to Harris, in part, and he was seeking to regain possession. The amount of cocaine involved in this case was worth approximately $6000. A fact finder could reasonably find such an amount is too great for personal consumption and must have been intended for sale and delivery. In addition, the facts clearly reveal the defendant chose to continue the kidnapping inside the burglarized premises and afterwards.

Intent may be inferred from all facts and circumstances surrounding the incident. United States v. Porter, 441 F.2d 1204, 1210 (8th Cir.), cert. denied, 404 U.S. 911, 92 S. Ct. 238, 30 L. Ed. 2d 184 (1971) (citations omitted). The determination of intent is a question for the trier of fact, and its determination should not lightly be overturned. Id.; see also United States v. O'Keefe, 722 F.2d 1175, 1181 (5th Cir. 1983). The evidence was sufficient to generate a jury question. The jury found the defendant had the requisite intent. Accordingly, we hold substantial evidence exists to support the jury's conclusion the defendant intended to commit an assault and/or felony when he entered Williams' apartment.

II. Acquittal on Second Degree Kidnapping Charge.

The kidnapping charge was submitted to the jury with three alternative intent elements: intent to secretly confine the victim, intent to inflict serious injury, and intent to extract a ransom.

The defendant forced the victim to remain in his custody and to travel to different locations in search of the cocaine. The defendant tried to hide the victim in a basement where the victim was tied up and gagged. We also note the evidence showing the victim was repeatedly threatened and assaulted. When we view all the evidence in the record in a light most favorable to the State, including legitimate inferences and presumptions reasonably deduced, we determine substantial evidence was presented sufficient to convince a rational fact finder the defendant is guilty beyond a reasonable doubt of kidnapping in the second degree.

III. Ineffective Assistance of Counsel.

We decline to address Harris's ineffective assistance of counsel claim at this time. When the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the claim for postconviction proceedings so the facts may be developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984) (citing State v. Mulder, 313 N.W.2d 885, 890 (Iowa 1981), cert. denied, 459 U.S. 841, 103 S. Ct. 90, 74 L. Ed. 2d 83 (1982)). This procedure provides the allegedly ineffective attorney with the opportunity to defend the charge. Mulder, 313 N.W.2d at

890. We conclude the record is inadequate for us to adjudicate the defense claim without counsel's explanation for his conduct. We therefore preserve the defendant's ineffective assistance of counsel claim for possible postconviction proceedings.

AFFIRMED.