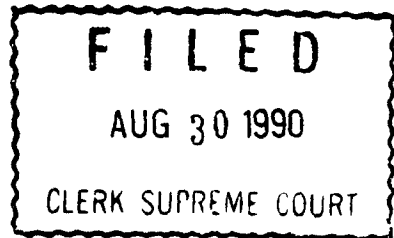


IN THE COURT OF APPEALS OF IOWA

No. 9-651 / 89-145



STATE OF IOWA,

Appellee,

vs.

JAMES JUNIOR JACKSON,

Appellant.

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Appeal from the Iowa District Court for Black Hawk County, Roger F. Petersen, Judge.

Defendant appeals a judgment and sentence entered by the trial court, following a jury trial, finding him guilty of second-degree burglary. **AFFIRMED.**

John W. Ackerman of Ackerman Law Office, Waterloo, for appellant.

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

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

**OXBERGER, C.J.**

James Junior Jackson appeals a judgment and sentence entered by the trial court, following a jury trial, finding him guilty of second-degree burglary. Jackson challenges his conviction on numerous grounds. Our scope of review in this case is confined to errors of law. Iowa R. App. P. 4. We affirm the decision of the trial court.

On the evening of August 3, 1988, James Jackson, Jeff Bennett, and Rodney Seals were returning to Waterloo after spending an evening in Cedar Rapids. While traveling on Interstate 380 north, Seals indicated he needed to use a restroom. Jackson pulled off the interstate onto the nearest gravel road. Jackson and Seals went to the restroom around the side of the car, while Bennett slept in the car. Jackson alleged at trial that at this point he turned around to see Seals walking in a direction away from the car. Jackson claims he walked after Seals but couldn't find him.

Jackson alleged as he was walking on the gravel road he saw a house nearby with the lights on. Jackson testified he thought he saw Seals through a window where the light was on. Jackson alleged he walked up to the window, tried to signal Seals to leave, but when he failed, he raised the window in the kitchen and told Seals to either come along or be left behind. Jackson contended as he returned to the car, Seals came running up with a purse.

Jackson testified Seals began throwing the contents of the purse into the middle section of the car. Jackson stated he then grabbed a handful of items and threw them at Seals and told him to get the items out of the car. Jackson alleged he then drove to Nettie Seals' house in Waterloo.

The police found a set of footprints near the kitchen window, which were subsequently matched with Jackson's shoes. They also found a set of fingerprints, which were also traced to Jackson. Jackson was subsequently arrested. At that time he told officers what had happened the night of the burglary. Jackson had earlier been questioned by police and had denied even knowing where the crime scene was. A search of Jackson's house revealed no shoes matching the prints; Jackson claimed Seals had worn them the night in question. Pictures of the scene were not taken until several weeks later.

At trial, the trial court overruled all of Jackson's objections. The jury returned a verdict of guilty and sentenced Jackson to a term of imprisonment not to exceed ten years. Jackson's subsequent motion for new trial was denied. Jackson has appealed.

#### I.

Jackson first contends the trial court erred in admitting his statements made to officer Mark Meyer as he did not intelligently, voluntarily or knowingly waive his

right to counsel. The State contends since Jackson failed to object to this evidence in the trial court he is barred from raising it on appeal. State v. Tobin, 333 N.W.2d 842 (Iowa 1983). We agree.

## II.

Next, Jackson argues the shoehorn, on which his fingerprints were found, was inadmissible because a sufficient chain of custody had not been shown. His contention is there was a sufficient gap in the chain of custody to preclude admission.

The State contends Jackson failed to preserve error on this issue. The State argues Jackson's objection at trial failed to sufficiently alert the trial court and opposing counsel of the basis for his chain of custody objection now raised on appeal. We disagree.

Trial was held on October 18, 1988. At trial deputy Steven Petersen was called as a witness by the State. Deputy Petersen testified he processed the shoehorn for fingerprint evidence. He stated the shoehorn was in the victim's deceased wife's purse when the purse was given to him at the victim's house. On voir dire examination, defense counsel question deputy Petersen about the origination of the shoehorn. Deputy Petersen testified he did not see the shoehorn out at the victim's farmhouse. He further testified he was informed that items were put into the purse when the purse was discovered lying in a ditch

near the house. He stated he was unsure whether the shoehorn was one of the items picked up and placed back in to the purse. Thereafter, defense counsel objected to admission of the shoehorn on the grounds that there was a "lack of foundation as to the origin of the shoehorn." The trial court overruled this objection.

On appeal, Jackson complains about the identification of the shoehorn. Upon our review of the record, we believe the trial court was sufficiently alerted as to the basis of Jackson's chain of custody objection. We find this issue was properly preserved in the trial court.

We now move to defendant's contention the trial court erred in admitting the shoehorn into evidence. As previously noted, Jackson claims the State failed to establish a sufficient chain of custody for the shoehorn.

"As a foundational prerequisite to the admissibility of physical evidence, the prosecution is required to show a sufficient custody to establish the article has not been altered between the time it was obtained and the time it is introduced at trial." State v. Lamp, 322 N.W.2d 48, 57 (Iowa 1982). The test for admissibility is whether it is reasonably probable that tampering, substitution, or alteration did not occur. Id. The sufficiency of the showing is dependent on the susceptibility of the article to alteration or substitution. Id. Whether a proper showing of custody has been established to admit evidence

over a chain of custody objection is within the trial court's sound discretion. We reverse the trial court's ruling only when there has been a clear abuse of that discretion. Id.

Upon our review of the record, we find no abuse of discretion by the trial court in admitting the shoehorn into evidence. John Lavenz, Sr. testified he had buried his deceased wife the day before the burglary. He testified when he awoke during the early morning hours of August 4, 1988, he found some lights on and a kitchen window open. He found his wife's purse and money from his wallet and money from memorials missing from the kitchen table. Mr. Lavenz's son later found the purse and its contents in a ditch near their mailbox. His son picked up the items and placed them inside the purse. A few hours later, the purse was turned over to Deputy Phillip Baskerville of the Black Hawk County Sheriff's Department upon his arrival.

At the sheriff's Department, the purse was turned over to Deputy Petersen. Deputy Petersen testified the shoehorn was in the purse when he received it. At this point Deputy Petersen processed the shoehorn for fingerprint evidence. The shoehorn was then placed in an envelope for use at trial.

At trial Deputy Petersen identified the shoehorn as that which he found in the purse. The fingerprints on the shoehorn were positively identified by Deputy Petersen as being the defendant's fingerprints. We find no abuse of discretion by the trial court in admitting the shoehorn into evidence.

### III.

Jackson also contends photographs of the victim's home were erroneously admitted into evidence. He claims the photos are irrelevant since they do not represent the condition of the room at the time of the burglary. He also alleges since the photos are black and white they possibly left out pertinent details. We find no merit in the defendant's contentions.

The admission of photographs is within the sound discretion of the trial court. State v. Chadwick, 328 N.W.2d 913, 917 (Iowa 1983). The relevancy of photographs ordinarily determines their admissibility. State v. Allen, 348 N.W.2d 243, 247 (Iowa 1984). "When photographs purport to show the scene of a crime, these foundational elements are satisfied by testimony of a person who observed what is depicted and states the photographs fairly represent what they show." State v. Farnum, 397 N.W.2d 744, 745 (Iowa 1986).

The photographs admitted into evidence as exhibits were pictures of the victim's living room, bedroom, and kitchen. There was also a picture of the kitchen window in both the closed position and halfway open position. Mr. Lavenz testified the pictures were fair and accurate representations of how the respective rooms appeared on the morning of the burglary. Mr. Lavenz further explained that when he awoke, he discovered the kitchen window was open and lights were on in all of the rooms leading to the back door. He also stated the back door was standing wide open.

The State contends the photographs of the living room, bedroom and kitchen were used to "illustrate the path taken by Mr. Lavenz as he discovered his home had been burglarized." The State also contends the photographs of the kitchen window in both the closed and half-open position was to "illustrate Mr. Lavenz's testimony regarding the before and after positions of the window." We find the use of these photos to be proper. Consequently, we hold the trial court did not abuse its discretion in admitting the photographs into evidence.

#### IV.

Jackson also argues there was insufficient evidence to prove an "entering" of the victim's house within the meaning of Iowa Code section 713.1. The State contends since Jackson was charged with the "breaking" alternative of second degree burglary, it was not required to establish entry. We agree.

Iowa Code section 713.1 provides:

Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

The trial information states Jackson did "break into an occupied structure not open to the public . . . ." The record reveals the jury was properly instructed on the necessary elements the crime of burglary in the second degree. We agree with the State that since Jackson was charged with the "breaking" alternative of second degree burglary, it was not required to establish entry. Consequently, we find the defendant's contention without merit.

#### V.

Jackson additionally contends numerous jury instructions impermissibly shifted the burden of proving knowledge and intent, depriving him of his right to due process of law.

The trial court submitted the Iowa Uniform Criminal Jury Instructions to the jury. Defense counsel objected to the jury instructions, arguing the instructions, taken as a whole, fail to protect his due process rights. The trial court overruled defense counsel's objections.

Jury instructions must be read together and related to each other, not piecemeal or in artificial isolation. State v. McMullin, 421 N.W.2d 517, 519-20 (Iowa 1988) (citing Cupp v. Naughten, 414 U.S. 141, 146-47, 94 S. Ct. 396, 400, 38 L. Ed. 2d 368, 373 (1973)). We note the proper analysis is whether the objected to instruction "by itself so infected the entire trial that the resulting conviction violates due process." Id. (quoting Naughten, 414 U.S. at 147, 94 S. Ct. at 400, 38 L. Ed. 2d at 374. We are reluctant to disapprove a Uniform Jury Instruction. State v. Doss, 355 N.W.2d 874, 881 (Iowa 1984).

We have examined completely the jury instructions submitted to the jury and those requested by the defendant. In our consideration of the instructions as a whole, we fail to discern any shifting of the State's required burden of proof. Consequently, we find the trial court's refusal to give instructions requested by the defendant was not error where substance of those instructions were adequately incorporated into instructions submitted to the jury.

Jackson also argues the instructions submitted to the jury relaxed the reasonable doubt standard considerably. He complains the phrase "firmly convinced" rather than the old language of "full and abiding conviction" and "mind wavering and vacillating" shifted the burden to the defendant.

Jury instructions are not deficient for failing to provide more than one standard for measuring the jurors' doubts. State v. McFarland, 287 N.W.2d 162, 163 (Iowa 1980), cert. denied, 449 U.S. 853 (1980). "'[N]o particular model or form is required in advising the jury concerning the meaning of reasonable doubt as long as a suitable standard is given.'" Id. (quoting State v. Finnegan, 237 N.W.2d 459, 460 (Iowa 1976)).

We find the jury instruction in this case to be adequate. The use of the term "firmly convinced" is a suitable standard for advising the jury, concerning the meaning of reasonable doubt. We find this contention without merit. We also find all of defendant's contentions regarding the jury instructions to be without merit even though not specifically addressed in this opinion.

#### VI.

Finally, Jackson argues the trial court abused its discretion in denying his motion for a new trial. He contends his motion should have been granted, since two of the witnesses, Jeff Bennett and Lisa Lawrence, had been unavailable as witnesses at the time of trial, and they could confirm what had really happened the night of the burglary. The State argues Jackson cannot meet the burden necessary to obtain a new trial because of newly discovered evidence. We agree.

To prevail on a motion for a new trial based upon newly-discovered evidence, a defendant must show: (1) the evidence could not have been discovered earlier in the exercise of due diligence; (2) the evidence is material to the issues in the case and not merely cumulative or impeaching; and (3) the evidence probably would have changed the result of the trial. State v. Whitsel, 339 N.W.2d 149, 156 (Iowa 1983). In passing on motions for new trial based on evidence newly discovered, the trial court is vested with wide discretion. State v. More, 382 N.W.2d 718, 723 (Iowa App. 1985). Motions for new trials based upon newly-discovered evidence are not favored and should be closely scrutinized and granted sparingly. State v. Farley, 226 N.W.2d 1, 3 (Iowa 1975).

In ruling on defendant's motion, the trial judge noted:

THE COURT: With respect to the Motion for New Trial, assuming for the purposes of argument that you were unable to locate these individuals in the exercise of due diligence, although not conceding that question, I'm going to overrule the motion. The statements of Lisa Lawrence and Rodney Seals in essence indicate basically the same thing that Mr. Jackson testified to during the trial.

I believe he was attempting to show that the shoes, which were never found and were the subject of some testimony concerning prints under the window, were in the presence of Rodney Seals. And I note in one of the affidavits there is support for his testimony. And I believe also Nettie Seals' testimony that Rodney Seals -- no Rodney Seals was seen with Lonnie Porter carrying a paper sack. And I think the inference to be drawn -- or that it was attempted to be drawn were that the shoes were in the sack, indicating that Seals had them.

I would concede that the testimony would -- would in essence support Mr. Jackson's testimony that he was with Rodney Seals during that day. And I believe his testimony was in essence indicating that Seals was the one that committed the offense. It's true there was nothing said about a gold watch, as I recall, although there was some testimony concerning the money, and that would simply be supporting what Mr. Jackson's testimony would be.

However, this is all after the fact, and I don't think this really adds a great deal to what happened out in the country at that particular house and who in essence broke into it. The jury found that Mr. Jackson did in spite of Mr. Jackson's protestations that it was Rodney Seals. So I'm going to overrule the Motion for a New Trial based on the fact that this would be cumulative and would not have changed the outcome of the verdict in my opinion -- or the outcome of the case in my opinion, although I do not concede that the evidence could have been discovered with due diligence. I'm simply not addressing that and assuming for the purposes of argument that it could not be.

We agree with the analysis of the trial court. We find, however, Jackson failed to satisfy all four of the elements necessary to prevail on his motion for new trial. We do not believe the trial court abuse its discretion in denying Jackson's motion for a new trial. We believe the evidence here was merely cumulative of other evidence in the record. We find defendant did not meet the burden necessary to obtain a new trial. The trial court properly denied defendant's motion for a new trial.

The defendant's conviction is affirmed.

**AFFIRMED.**