



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Filed August 30, 1983

Plaintiff-Appellee,

)

vs.

)

3-76
68222

ROBIN JOE KUHNS,

)

Defendant-Appellant.

)

Appeal from Polk District Court, Rodney J. Ryan, Judge.

Defendant appeals from his conviction of burglary in the second degree.

AFFIRMED.

Garry D. Woodward, Des Moines, for plaintiff-appellee.

Thomas J. Miller, Attorney General, and Steven Foritano, Assistant
Attorney General, for defendant-appellant.

Heard by Oxberger, C.J., and Donielson, Snell, Schlegel, and Hayden, JJ.

OXBERGER, C.J.

Defendant appeals from his conviction of burglary in the second degree. Iowa Code §§ 713.1, .3 (1981). On appeal, he asserts, among other things, that the court should have instructed the jury on the lesser included offense of criminal trespass, Iowa Code § 716.7(2)(a)(1981). We affirm.

L Criminal Trespass

Two tests must be satisfied before one offense may be deemed to be a lesser included offense of another:

The first is the legal or element test. The lesser offense must be composed solely of some but not all elements of the greater crime. The second, "factual" test is an ad hoc determination whether there is a factual basis in the record.

State v. Sangster, 229 N.W.2d 661, 663(1981), quoting State v. Fernald, 263 N.W.2d 751, 752 (Iowa 1978).

Burglary is defined, in part, as follows:

Any person, having the intent to commit a felony, assault, or theft therein, who having no right, license or privilege to do so, [1] enters 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. . . commits burglary.

Iowa Code § 713.1 (1981).

The Code provides, in relevant part, that criminal trespass is:

Entering upon or in property without justification or without the implied or actual permission of the owner, lessee, or person in lawful possession with the intent to commit a public offense or to use, remove therefrom, alter, damage, harass, or place thereon or therein anything animate or inanimate.

Iowa Code § 716.1(2)(1981).

The supreme court has held that criminal trespass is a lesser offense that is necessarily included in burglary as defined above. That is, it is impossible to commit burglary as defined in subsection (1) of section 713.1 without also committing criminal trespass. State v. Wales, 325 N.W.2d 87 (Iowa 1982). We conclude, and the State concedes, that the legal test has been met.

The rule controlling our analysis was set forth in State v. Morgan, 322 N.W.2d 68 (Iowa 1982) and State v. Harlow, 325 N.W.2d 90 (Iowa 1982): "[W]hen the major offense consists of elements A, B, C, the lesser offense consists of elements B and C, and the record does not contain substantial evidence from some quarter controverting element A, the State's case stands or falls on the major offense." Morgan at 69-70 (emphasis in original).

Because the crime of burglary requires the intent to commit a theft, rather than the more general intent to commit a public offense as required by criminal trespass, State v. Sangster, 299 N.W.2d 660, 664 (Iowa 1980), the crucial question in this case, as it was in Harlow, 325 N.W.2d at 91, is whether there is any evidence in the record to support the conclusion that Farrington and Scott entered the victim's residence with anything other than the intent to commit a theft.

The defendant offered no evidence controverting the theft issue. His defense was directed to establishing that he did not know Farrington and Scott were planning to commit any crime. There was not any evidence that Farrington and Scott's plans were to vandalize the house. He seeks to raise the issue of vandalism by inference only. Farrington and Scott did not testify.

We hold that the defendant's speculation that Farrington and Scott entered the victim's house with the intent to vandalize and that Scott, on a frolick of his own filched a few minor items does not meet the "substantial evidence from some quarter" test set forth in Morgan id. at 69-70.

II. Sufficiency of Evidence

This assignment of error is reviewed under familiar principles which need not be repeated here. See State v. Holderness, 293 N.W.2d 226, 235 (Iowa 1980). In applying those principles, we draw no distinction between the probative value of direct and circumstantial evidence.

The jury could have found that the defendant informed Farrington and Scott about the victim's stereo, when he would be working, and when the house would be vacant. They could have found the three men planned the crime together, with the defendant driving the getaway car. We find the evidence is sufficient to support the conviction.

III. Scope of Cross-Examination

The crime took place in the early morning hours of October 11. The trial court permitted cross-examination of the defendant concerning events during the proceeding 24 hours involving the alleged participants. We find the trial court did not abuse its discretion under the standards set forth in State v. Monroe, 236 N.W.2d 24, 29 (Iowa 1975). Iowa R. Crim. P. 19(1).

IV. Judge's Absence

The defendant did not object at trial to the trial judge's absence from the bench during closing arguments. Failure to object at trial constitutes a waiver of the claimed error. State v. Love, 302 N.W.2d 115, 121 (Iowa 1981).

V. Trial Information

Iowa R. Crim. P. 10(2)(b) requires that defenses or objections based on defects in the trial information must be raised not later than forty days after arraignment. Defendant failed to establish good cause for failure to comply with the rule, thus he has waived this alleged defect. State v. Hobson, 284 N.W.2d 239, 241 (Iowa 1979).

We have examined the other issues raised by the defendant and find no error.

AFFIRMED.