IN THE COURT OF APPEALS OF IOWA

No. 9-592 / 89-136

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

KENNETH B. RADER,

Appellant.

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Appeal from the Iowa District Court for Woodbury County, Phillip S. Dandos, Judge.

The defendant appeals from his conviction following a jury trial for first-degree burglary. He challenges the sufficiency of the evidence to establish one of the elements of burglary, namely that he lacked permission to enter the apartment in question. **REVERSED.**

Raymond E. Rogers, State Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, Ann Brenden, Assistant Attorney General, and Thomas Mullin, County Attorney, for appellee.

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

PER CURIAM

Kenneth Rader, who was temporarily without a job or a place to live, stayed for several weeks in the LaFave apartment. This apartment was occupied on a permanent basis by Rader's friend, Tom LaFave, by Tom's father, Richard LaFave, and by Tom's brother. Richard LaFave, the father, paid the rent on this apartment and he, along with his wife and their minor children, were considered by the owner of the apartment building to have been the tenants of the apartment in question. Tom LaFave had not presumed to have the authority on his own to permit Rader to move into the apartment. He acknowledged his father's permission first had to be obtained. Kenneth Rader sought and obtained the permission of Richard LaFave to stay in the apartment.

After Rader had stayed at the LaFave apartment for several weeks, he and his friend Tom LaFave had a disagreement over a debt Rader allegedly owed Tom's brother. Tom LaFave ordered Rader out of the apartment, and Rader stayed elsewhere for a few days. He then located other quarters and decided to return to the LaFave apartment to retrieve his personal belongings. On June 22, 1988, Tom LaFave denied Rader entrance to the apartment. Rader then kicked down two doors, entered the apartment, displayed a gun, and threatened Tom LaFave. Rader testified he displayed a gun and made threats only after

Tom LaFave brandished a butcher knife; LaFave disputes this. Rader then gathered his personal belongings and left without further incident.

Richard LaFave was not involved at any time in ordering Rader out of the apartment or in blocking his entrance to it on the 22nd, and Richard LaFave never withdrew his permission for Rader to occupy the apartment. He testified that if he had been home at the time of the confrontation, he would have allowed Rader into the apartment to retrieve his belongings. However, Richard also testified that in his absence, it was up to Tom to decide whom to admit to the apartment.

As a result of the events on the 22nd, Rader was charged with first-degree burglary. A jury found him guilty, and he has appealed from the resulting conviction.

Rader challenges the sufficiency of the evidence to prove one of the elements of the crime of burglary, namely that his entry into the apartment was done without any "right, license or privilege to do so." Iowa Code § 713.1 (1987). He contends he had a right, license or privilege to enter the apartment because Richard LaFave, the renter of the apartment, never withdrew his permission for Rader to enter the apartment.

Error with respect to the sufficiency of the evidence to support Rader's conviction, was preserved by his motion for acquittal at the conclusion of the State's evidence.

State v. Miles, 346 N.W.2d 517, 519 (Iowa 1984). We will uphold a verdict where there is substantial evidence in the record tending to support the charge. State v. Wheeler, 403 N.W.2d 58, 60 (Iowa App. 1987). The standards governing a challenge to the sufficiency of the evidence are well established:

> When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the state, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." It is necessary to consider all the evidence in the record and not just the evidence supporting the verdict to determine whether there is substantial evidence to support the charge. Substantial evidence means evidence which would convince a rational factfinder that the defendant is guilty beyond a reasonable doubt.

Id. (citations omitted).

Rader contends the State failed to present sufficient evidence to prove he did not have a "right, license or privilege" to enter the LaFave residence. Lack of such right, license, or privilege is an element of burglary which must be proven by the State. State v. Franklin, 368 N.W.2d 716, 718 (Iowa 1985); State v. King, 344 N.W.2d 562, 563 (Iowa App. 1983). From our review of the record, it is apparent insufficient evidence existed to prove Rader did not have a "right, license or privilege" to enter the apartment in question on June 22, 1988.

The evidence at trial revealed Richard LaFave was the renter of this apartment and his permission was sought to enable Rader to stay there. Rader ate and slept at the apartment, kept personal possessions there, received mail at that address, and paid Richard LaFave money to stay in the apartment. Richard LaFave stated he knew his son, Tom, and Rader had gotten into a disagreement before June 22nd, yet he testified Rader had been welcome to come to the apartment in the month of June, and he had never informed Rader he was no longer welcome or could not come back to the apartment. Richard LaFave also testified he would not have stopped Rader from entering the apartment on the 22nd and retrieving his possessions.

The issue in this case is whether the State presented sufficient evidence to prove the defendant illegally entered the occupied structure. We find the evidence was insufficient. Rader was staying at the LaFave residence with the express permission of the leaseholder, Richard LaFave. While his status was only that of temporary resident or guest, he clearly had been given the privilege to enter the residence, and as of June 22, 1988, Richard LaFave had not withdrawn that privilege. At most, the record in this case shows Tom LaFave refused to admit Rader into the apartment on June 22, 1988. The record fails to demonstrate Rader had no right, license, or privilege to enter the apartment.

Kenny Rader took some admittedly excessive self-help measures to retrieve his personal property. His actions undoubtedly constituted an error in judgment and may well have involved some violation of the law. Under the facts of this case, however, they did not amount to first-degree burglary.

REVERSED.

Oxberger, C.J., concurs; Donielson, J., dissents; and Sackett, J., specially concurs.

SACKETT, J. (specially concurring)

I concur with the majority's opinion. I write to clarify my position.

The issue here is not whether family members can deny access to a family home. Rather, the question is, is a person a burglar when he or she seeks entry to a dwelling he or she has the owner's permission to enter, when the entry is thwarted by another occupant? The person leasing the apartment testified defendant had his permission to be there. While I consider defendant's conduct uncalled for, it was of such a nature that other criminal charges would lie if it is not burglary.

DONIELSON, J. (dissenting)

I respectfully dissent. Kenneth Rader was nothing more than a guest who intermittently stayed in the LaFave home during the month of June in 1988. He was allowed to stay in the home only because of his friendship with Tom LaFave. Following a disagreement, Tom LaFave had called Rader's paging service and left a message that Rader was no longer welcome in the LaFave apartment. Tom LaFave testified Rader attempted to return to the apartment a few days prior to the incident on the 22nd, and Tom refused to let him in. On that day, Rader left the apartment without a scene.

On the 22nd, Rader returned to the apartment and when denied entrance he broke down two doors and brandished a gun. Violent and threatening behavior is not generally indicative of one who has a "right, license or privilege" to enter a structure.

I find the majority's decision disturbing in that it appears to deny familial inhabitants of a residence the right to deny admittance to people, no matter how unwelcome or threatening they are, if they have previously obtained permission from the occupant who makes the rent or house payments. The rigid focus upon Richard LaFave's failure to revoke his permission allowing Rader to stay in the apartment, is unduly narrow and ignores the realities of family life in a residence and the possessory interests

even juvenile inhabitants have in their home. I am not ready to deny other family members the right to withdraw a previously granted privilege to enter their residence.

Rader was clearly on notice he was no longer welcome in the LaFave home. This knowledge is demonstrated by the fact he felt the need to carry a gun to the apartment on the 22nd. I would find sufficient evidence existed to prove Rader had no "right, license or privilege" to enter the LaFave household on June 22, 1988. I would affirm the trial court's conviction.