FILED
AUG 30 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed August 30, 1983

vs.)

CHRISTOPHER F. PADAVICH,) 3-169/68490

Defendant-Appellant.)

Appeal from Appanoose District Court - James P. Reilly, Judge.

Defendant appeals from his conviction of burglary in the second degree and theft in the third degree in violation of Iowa Code §§ 713.3 and 714.2(3) (1981). REVERSED.

Francis Hoyt, Appellate Defender, and Charles L. Harrington, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Richard L. Cleland, Assistant Attorney General, for plaintiff-appelleee.

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

PER CURIAM

Defendant appeals from his conviction of burglary in the second degree and theft in the third degree, in violation of Iowa Code §§ 713.3 and 714.2(3) (1981). We reverse.

I.

Defendant was charged by trial information with second degree burglary and third degree theft. It was alleged that he broke into Dennis Strickler's house and removed eighteen raccoon pelts.

The case was tried to a jury. At trial, the only evidence linking defendant to the theft of the raccoon pelts was the testimony of Strickler's brother, who stated that on the day of the robbery he saw defendant and another person standing beside a pickup truck about 200 yards from Strickler's house. The State also proved that defendant had sold eighteen raccoon hides to a fur and wool merchant, however, no evidence was introduced which would tend to identify the pelts which defendant sold as the pelts Strickler alleges were stolen. No evidence was introduced which placed defendant on the Strickler property (or even any closer than 200 yards) on the date of the burglary.

The jury found defendant guilty on both counts. He was sentenced to incarceration for up to ten years on the burglary count, and to a term "not to exceed Two (2) years" on the theft count. Both terms were to be served concurrently.

On appeal, defendant cites four grounds for reversal. Defendant first contends that the trial court erred in overruling his motion for a directed verdict, since there was no substantial evidence that defendant entered the victim's house and removed any raccoon pelts. Defendant next contends that the trial court erred in failing to instruct the jury on criminal trespass as a lesser included offense of burglary. Defendant's third allegation of error is that the trial court permitted improper rebuttal testimony. Lastly, defendant contends that the trial

court erred in sentencing defendant to a term "not to exceed two years" on the third degree theft conviction, since third degree theft is an aggravated misdemeanor and carries a determinate sentence. The State concedes error on this last issue, and asks that the sentence on the theft conviction be vacated and the case remanded for resentencing on that charge.

II.

Iowa Rule of Criminal Procedure 8(a) provides that, upon motion of the defendant, the trial court must enter a judgment of acquittal on any offense with which defendant is charged if the evidence offered by the State is insufficient to sustain a conviction for that offense. Defendant argues that the evidence offered by the State was insufficient to permit submission of the charged offenses to the jury, since no evidence was offered tending to establish that defendant entered the victim's residence, or that the pelts defendant sold had been stolen.

When this court reviews a motion for a directed verdict based upon an alleged insufficiency of the evidence, it views the evidence in the light most favorable to the State, accepting all legitimate inferences which may fairly be drawn therefrom. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). The trial court's refusal to direct a verdict for defendant must be sustained if there is any substantial evidence in the record to support the charge. State v. York, 256 N.W.2d 922, 927 (Iowa 1977). We note that substantial evidence must exist to support each and every essential element of the offense.

Evidence is considered substantial when it is sufficient to convince a rational factfinder beyond a reasonable doubt that defendant is guilty of the offense charged. State v. Robinson, 288 N.W.2d 337,338 (Iowa 1980). Thus, we look to see if evidence has been introduced which would, if believed, tend to establish all of the requisite elements of the offense for which defendant is charged. Circumstantial evidence is given the same probative value as direct evidence in our examination. "Whether the evidence is direct or circumstantial,

however, it must raise a fair inference of guilt; it must do more than create speculation, suspicion, or conjecture." State v. Schrier, 300 N.W.2d at 308. See State v. Lewis, 242 N.W.2d 711, 724 (Iowa 1976).

It is our opinion that the evidence offered by the State does no more than create suspicion and conjecture. The only evidence connecting defendant to the burglary and theft is the fact that he was seen standing with a companion by a pickup truck some 200 yards from the victim's property shortly after noon, and that defendant sold the same number of raccoon pelts as the victim alleged had been stolen from him. The evidence does not establish the time of the break-in (it could have occurred anytime between noon and 10:30 p.m.), nor does it establish that the pelts which defendant sold were those that had been stolen. The pelts were not introduced into evidence, and although testimony was given by the defense concerning peculiar characteristics of the pelts defendant sold, the State offered no evidence concerning the condition of the pelts which were allegedly stolen. This evidence may fairly create speculation concerning defendant's innocence, but it does not raise a fair inference of guilt. The trial court erred in refusing to direct a verdict of acquittal on both charges. Accordingly, we reverse.

REVERSED.