FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed October 22, 1986 488

vs.)

TERRY L. THOMAS,) 6-371
85-1609

Defendant-Appellant.)

Appeal from the Iowa District Court for Woodbury County (No. Criminal 41642) - Michael S. Walsh, Judge.

Defendant appeals from his conviction for burglary in the second degree. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Lona Hansen, Assistant Attorney General; and Dennis D. Hendrickson, Assistant County Attorney, for plaintiff-appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

PER CURIAM 489

The defendant appeals from his conviction for burglary in the second degree, asserting that the evidence was insufficient to support a verdict of guilty and that the jury should have been instructed that defendant's cooperation with police was a factor to be considered in determining guilt or innocence. We affirm.

A black male was observed one morning in a residential neighborhood walking down the street while carrying bags under his arms. He placed items that he was carrying next to a wall, walked further down the street, looked around, returned, and picked up the items. That same morning a person who was remodeling a house in the area received a telephone message regarding suspicious activity in a house across the street. He then observed someone near the patio of that house and also saw someone in a wooded area behind the house. He also noticed a broken window in an inner door of the house. He later identified defendant as the man who had walked from the house up to a car parked in front on the street.

A blue car was parked on the street with someone inside it when defendant was observed walking toward it. The car drove away and defendant was next observed walking down the street carrying two or three objects. Police were called. The officer who arrived in the vicinity initially saw nothing suspicious, but shortly thereafter saw defendant walking toward him. When stopped and asked for identification, defendant stated that he had none but gave the officer his correct name, address, and social security number. Defendant told the officer that he had been visiting friends in the neighborhood and was walking to a bus stop. He complied with a request to wait in the police car and was arrested when he was subsequently identified as the person seen in the vicinity of the house which had been burglarized.

Items taken from the burglarized house were found in two bags and cardboard box at a street corner in the vicinity. The officer who found those items testified at defendant's burglary trial that after his arrest defendant made a statement that the officer could get him with possession of stolen property but couldn't prove that he was in that house.

The jury returned a verdict of guilty. The trial court refused defendant's request for an instruction stating that his failure to flee and cooperation with police officers investigating the crime was conduct which the jury may consider in determining guilt or innocence.

The defendant concedes that our review requires us to view the evidence in a light most favorable to the State, including all legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. State v. Blair, 347 N.W.2d 416, 418-19 (Iowa 1984). A jury verdict is binding upon this court and will be upheld unless the record lacks substantial evidence. Id. Substantial evidence means evidence which would convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. Id.

We find substantial evidence which would lead a jury to conclude that defendant was guilty of burglary in the second degree beyond a reasonable doubt. Defendant was observed walking alongside the house to a car parked out in front. The carpenter working across the street positively identified defendant as the one walking from the house and also observed a broken window in an inner door of the house. Another witness testified that she observed a black male in the area carrying suspicious bundles of goods in his arm walk down the street, place the bundles next to a wall, look around, and return to pick up the bundles. Defendant was later questioned by police in the vicinity of the burglary and was subsequently arrested when a positive identification was made. The

bundles of goods taken from the home were found on the street corner where they had been observed being placed. The defendant admitted to the police his possession of the stolen property. The owner of the house testified that the defendant was not authorized to enter or take anything from his house. The evidence of burglary was substantial, even though no one actually witnessed defendant enter the house. For purposes of proving guilt beyond a reasonable doubt, circumstantial evidence is as equally probative as direct evidence. State v. Doss, 355 N.W.2d 874, 878 (Iowa 1984). We therefore reject defendant's claim that the evidence was insufficient to support the jury verdict.

Defendant also contends that the trial court should have instructed that defendant's cooperation with police was a factor to be considered in determining guilt or innocence. We disagree.

In State v. Cunha, 193 N.W.2d 106, 111 (Iowa 1972), the Iowa Supreme Court summarily rejected a defendant's claim that the trial court erred in refusing to instruct the jury that defendant's actions in turning himself in was evidence of innocence. The Cunha court stated that "[t]he instruction was not essential to proper submission of the case and it was well within the court's discretion to refuse it."

In United States v. McQuarry, 726 F.2d 401 (8th Cir. 1984), the defendant argued that the trial court improperly refused to instruct the jury that his failure to flee from the site of the crime gives rise to an inference of innocence. The Eighth Circuit opined:

> The district court rejected this contention as unsupported by case law and we agree. Appellant's brief concedes that no American case allowed such an instruction. One court, however, explicitly rejected a similar instruction, holding that failure to flee or resist arrest does not increase the probability of the defendant's innocence. United States v. Scott, 446 F.2d 509, 510 (9th Cir. 1971). Another court held that absence of flight may properly be argued to the jury, but the court declined to give

> the argument "the status of being particularly significant by being enshrined in an instruction." United States v. Telfaire, 469 F.2d 552, 558 (D.C. Cir. 1972) (per curiam). Other cases support the district court's discretion in declining to emphasize through jury instructions a particular piece of evidence favorable to the defendant. United States v. Keane, 522 F.2d 534 (7th Cir. 1975); Blauner v. United States, 293 F.2d 723 (8th Cir. 1961). Moreover, defense counsel emphasized McQuarry's failure to flee in his closing argument, so the jury could have considered this fact in their deliberations.

In the instant case, the record does not reflect whether the defense counsel argued that defendant's cooperation gave rise to an inference of innocence. We do note, however, that the trial court specifically indicated that defense counsel was free to argue all inferences that could be drawn from defendant's cooperative conduct. The court therefore gave defendant the opportunity to present this claim at trial. We therefore hold that the trial court was correct in refusing to grant defendant's requested jury instruction.

AFFIRMED.