FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed February 26, 1985
vs.	)	
LLOYD HAROLD WENMAN, JR.,	)	4-553 84-802
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Johnson County - L. Vern Robinson, Judge.

Defendant appeals from his conviction for burglary in the second degree in violation of Iowa Code section 713.5, asserting that the jury should have been instructed on criminal trespass as a lesser-included offense. REVERSED AND REMANDED FOR NEW TRIAL.

Charles L. Harrington, Appellate Defender, and Patrick R. Grady, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Mary Jane Blink, Assistant Attorney General, for plaintiff-appellee.

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

The defendant appeals from his conviction of second-degree burglary in connection with the robbery of a home in Iowa City. On the night of December 21, 1982, the owner returned home to find his house ransacked and saw the defendant flee out the front door. The homeowner and a friend gave chase and apprehended the defendant approximately 100 yards from the house. They both testified that the defendant said he was sorry, that he had just gotten out of jail, that he didn't intend to mess the house up, that he only unplugged the speakers of the stereo, and that he only wanted to see the wine cellar.

The homeowner also testified that upon searching the house he discovered his stereo speakers and some of his shotguns in cases by the front door. Upon further search, he found that a .38 caliber revolver was missing. The defendant had not had the gun in his possession when apprehended and the evidence indicated that a second person had been present.

The defendant testified that he was with a friend, Greg Wildman, on December 21; that Wildman and he drove to the defendant's house and Wildman entered the house by himself and returned approximately five minutes later; that Wildman then asked him to come into the house to see the wine cellar. The defendant denied putting the guns in the cases or unplugging the speakers. He claimed he had no intention of robbing the home but only entered for the purpose of seeing the wine cellar. A police officer testified, on rebuttal, that the defendant told him that he and his friend had broken into the home to get the guns.

The defense requested a jury instruction on criminal trespass as a lesser-included offense. The trial court rejected this request and instructed only on second-degree burglary.

On appeal, the defendant claims that the trial court should have given the requested instruction on criminal trespass.

There are two tests which must be satisfied in determining when an offense is a lesser-included offense: a legal test and a factual test. State v. Sangster, 299 N.W.2d 661, 663 (Iowa 1980). In Sangster, the Iowa Supreme Court set forth the legal test for determining whether an offense is to be included as a lesser-included offense:

> To satisfy the legal test, the minor offense must be an elementary part of the major offense. The lesser offense is necessarily included in the greater offense if it is impossible to commit the greater without also committing the lesser. If the lesser offense contains an element not required for the greater offense, the lesser cannot be included in the greater. This is because it would be possible in that situation to commit the greater without also having committed the lesser.
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> When the elements of the major offense are identified, the next inquiry is whether the elements of the lesser offense are included in them. For that purpose, it is necessary to identify the elements of the lesser offense. If the minor offense is defined alternatively, the offense is included if any of the alternatives are included. Because an offense is necessarily included in another if it is an elementary part of the greater, an offense is necessarily included if one of its statutory definitions makes it an elementary part of a greater offense. When so included, the major offense cannot be committed without also committing the minor offense.

Id. at 663-664 (citations omitted).

Burglary is defined in Iowa Code section 713.1:

> 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 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, 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 or other place where anything of value is kept, commits burglary.

Iowa Code § 713.1 (1983).

Under this statute, burglary may be committed in three alternative ways. It

has been held that these three alternatives are disjunctive and not conjunctive. State v. Wales, 325 N.W.2d 87, 88 (Iowa 1982). In Sangster, the Iowa Supreme Court ruled that criminal trespass was a lesser-included offense when the State relied only on alternative one. Sangster, 299 N.W.2d at 664. In Wales, the court was faced with the issue of whether the instruction for criminal trespass must be given when the State relies on two of the three alternatives, one of which (entering) entitled the defendant to an instruction on criminal trespass while the other (breaking) did not. The court held:

> [T]hat when more than one statutory alternative of the major offense is submitted to the jury, and one of the alternatives includes a lesser offense, the defendant is entitled to have the lesser offense submitted as to that alternative, if the factual test for its submission is also satisfied.

Wales, 325 N.W.2d at 89.

In this case, the State relied on all three alternatives. Under the holdings of Sangster and Wales, the defendant is entitled to have the instruction of criminal trespass as a lesser-included offense, if the factual test for its submission is also met.

The factual test turns on whether there is a factual basis in the record for submitting the test to the jury. In State v. Morgan, 322 N.W.2d 68 (Iowa 1982), the supreme court recognized that in certain instances there is no factual basis for submitting the lesser-included offense but rather only the major offense. This is known as the "all or nothing rule." As the court stated:

> In the included offense setting the courts apply a principle that when the major offense consists of elements A, B, and 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.

State v. Morgan, 322 N.W.2d 68, 69-70 (Iowa 1982).

We reject the State's argument that this "all or nothing" rule applies in this case. Burglary requires entry with "intent to commit a felony, assault or theft."

Iowa Code § 713.1 (1983). Criminal trespass requires entry with "intent to commit a public offense, to use, remove therefrom, alter, damage, harass or place thereon or therein anything animate or inanimate on or in the property." Iowa Code § 716.7(2)(a) (1983).

There was evidence presented that the defendant entered to look at the wine cellar, that while he was there he only unplugged the stereo speakers, and that he only wanted a bottle of wine. Under this evidence, a rational jury could find the defendant guilty of criminal trespass. Because the legal and factual tests were satisfied for the lesser-included offense of criminal trespass, an instruction on this offense should have been submitted to the jury. The trial court erred in refusing the defendant's motion for such an instruction.

REVERSED AND REMANDED FOR NEW TRIAL.