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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,)

Plaintiff-Appellee,) Filed February 24, 1982

vs.)

DANIEL CURTIS HARLOW,) 1-380/66193

Defendant-Appellant.)

Appeal from Story District Court - Russell J. Hill, Judge.

Defendant appeals from his conviction of burglary in the second degree in violation of sections 713.1 and 713.3, The Code. AFFIRMED.

William J. Pattinson of Hegland, Newbrough, Johnston, Brewer & Maddux, Ames, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Teresa Baustian, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant, Daniel Curtis Harlow, appeals from his conviction of burglary in the second degree in violation of sections 713.1 and 713.3, The Code. He asserts: 1) trial court erred in refusing to instruct the jury on criminal trespass as a lesser included offense of burglary; 2) there was no substantial evidence to justify giving a "flight" instruction; 3) trial court erred in permitting the State to question defendant with regard to a prior felony conviction. We affirm.

On June 6, 1980, defendant was charged by county attorney's information with burglary in the second degree, in violation of section 713.3, The Code. The information alleged defendant "did enter the Good Oil Company in Collins, Iowa, with the intent to commit a theft having no right, license or privilege to do so." A subsequent oral modification was made to add the "breaking" alternative contained in the definition of burglary set forth in section 713.1, The Code.[1]

During trial, defendant moved for an order in limine prohibiting the State from inquiring as to defendant's prior felony conviction. Trial court overruled the motion and the State questioned defendant, without objection, about the felony conviction. Prior to submission of the case to the jury, defendant requested trial court to instruct the jury on the offense of trespass as a lesser included offense of burglary, but trial court refused to give the instruction. Defendant also objected to trial court's "flight" instruction as unjustified because of a lack of substantial evidence of flight. Trial court overruled this objection and so instructed the jury.

Following conviction by the jury, defendant filed a motion for new trial alleging trial court erred in its instructions to the jury. Trial court overruled this motion and sentenced defendant to 10 years imprisonment. This appeal followed.

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[1] This occurred during the first trial, which resulted in a mistrial.

I. Scope of Review. Since this is an action at law, our review is for correction of errors only. Iowa R. App. P. 4; Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975).

II. Instruction on Criminal Trespass. Defendant argues that since criminal trespass is a lesser included offense of burglary, the jury should have been instructed on that crime. We disagree.

There are two tests under Iowa R. Crim. P. 21(3) for determining whether an offense is "necessarily included." State v. Law, 306 N.W.2d 756, 758 (Iowa 1981). "The first step, the legal test, requires an analysis of the elements of the offenses. [citation] Generally, a lesser offense is included in the greater offense if, in committing the greater offense as defined by statute, a person necessarily commits the minor offense. [citation]." Id. That is, "[t]he lesser offense must be composed solely of some but not all the elements of the greater crime." (emphasis in the original). State v. Sangster, 299 N.W.2d 661, 663 (Iowa 1980) quoting State v. Furnald, 263 N.W.2d 751, 752 (Iowa 1978). "[T]he minor offense must be an elementary part of the major offense." Sangster, 299 N.W.2d at 663. "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." Id. "Where the offense being prosecuted . . . may be committed in alternative ways, and one alternative clearly does not involve the lesser offense, the lesser offense is not necessarily included in the greater." Law, 306 N.W.2d at 759. "It 'is irrelevant that the greater crime includes the lesser crime as one of its alternative ways of being committed.' " Id., quoting Dunahoo, The New Iowa Criminal Code: Part II, 29 Drake L. Rev. 491, 498 (1980).

In the instant case, the State chose to charge defendant with two alternatives. The elements were thus: (1) Breaking or entering an area enclosed in such a manner as to provide a place for the keeping of valuable property secure

from theft or criminal mischief, (2) without authorization, and (3) with the intent to commit a theft therein. Under section 716.7(2)(a), criminal trespass is committed when a person: 1) enters upon or in property, 2) without justification or without implied or actual permission of the owner, lessee, or person in lawful possession, 3) with intent to commit a public offense. Since burglary under the alternatives involved in this case may be committed by merely breaking with the requisite intent, it may be accomplished without committing criminal trespass. Criminal trespass is thus not necessarily included in the burglary charge. Having failed the legal test, we need not consider the second factual test and conclude trial court did not err in refusing to instruct the jury on criminal trespass.

III. "Flight" Instruction. Next defendant argues that there was insufficient evidence to justify a "flight" instruction. To be sure, a factual basis in the record is a prerequisite for the issuing of a "flight" instruction. State v. Horstmann, 222 N.W.2d 427, 431 (Iowa 1974). However, we conclude that the record in this case fully justifies trial court's instruction. There was evidence of defendant's participation in concerted action with others in an attempt to accomplish a theft on the premises. There also was evidence of a hasty retreat by those participants. Although the defendant was not seen on the premises by the arresting officers, his valuables and tools were found, seemingly abandoned, near the structure. We believe this evidence of a disorganized departure engendered a jury question on the issue and thus justified trial court's instruction. Id.

IV. Prior Felony. Defendant finally argues that trial court erred in allowing the State to cross-examine him concerning a prior felony conviction. We disagree.

Ordinarily, the rejection of a motion in limine is not reversible error. The error comes, if at all, when the matter is presented at trial and the evidence is admitted or refused. State v. Langley, 265 N.W.2d 718, 720 (Iowa 1978). "[W]here

the motion is denied, the complainant must base his complaint on the trial record." (emphasis in original). State v. Garrett, 183 N.W.2d 652, 655 (Iowa 1971). Defendant, however, failed to object at trial to the cross-examination involving his prior felony history. Having failed to object at trial, defendant has not preserved error for appeal. Id.

Having found no error in trial court's rulings, we affirm.

AFFIRMED.

All judges concur except Oxberger, C.J., who specially concurs.

OXBERGER, C.J., (concurring specially).

I concur with the result reached by the majority. I believe another look is needed at the law regarding included offenses.

In State v. Webb, N.W.2d (Iowa Dec. 23, 1981), the defendant was charged with a shooting death. The court held that since involuntary manslaughter could be committed without committing an assault that the greater crime does not necessarily include an assault. The test to be used is a theoretical test, not a practical test. I do not believe the average citizen gains respect for the legal system when we say that shooting a person with a gun is not necessarily an assault.

In this case we have the same problem with the theoretical test. There is no way that the defendant in this case could break the pop machine without being guilty of a criminal trespass. In some theoretical situations, burglary breaking may be accomplished without criminal trespass. I believe the test should be applied to the situation at hand, not some theoretical test.