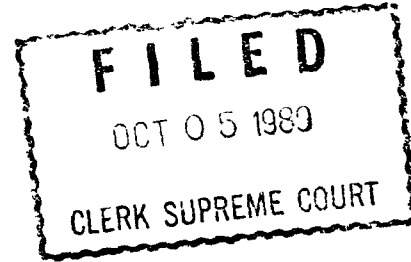


IN THE COURT OF APPEALS OF IOWA

No. 9-384 / 88-1019



STATE OF IOWA,

Appellee,

vs.

ALPHONZO DAVID DILLON, JR.,

Appellant.

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Appeal from the Iowa District Court for Louisa County,
R. David Fahey, Judge.

Dillon appeals from his conviction following a jury
verdict of second-degree burglary and third-degree theft.
REVERSED.

Raymond E. Rogers, State Appellate Defender, and Barbara
M. Anderson, Assistant State Appellate Defender, for
appellant.

Thomas J. Miller, Attorney General; Amy M.
Anderson, Assistant Attorney General; and Roger A. Huddle,
Louisa County Attorney, for appellee.

Considered by Oxberger, C.J., and Sackett and Habhab,
JJ.

OXBERGER, C.J.

The fighting issue in this burglary appeal is whether proof the defendant went into the Welsch home and stole two or three hunting bows is proof he did not have permission to enter the Welsch home. In other words, does evidence of theft of an object inside a house prove the thief entered the house without the permission of the owner? The defendant has not appealed the two-year prison sentence for conviction of theft of the Welsch hunting bows. We reverse but do not remand.

In State v. Wheeler, 403 N.W.2d 58, 60 (Iowa App. 1987), this court recently summarized the standards governing sufficiency of evidence challenges:

We will uphold a verdict where there is substantial evidence in the record tending to support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).

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. State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985); State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). 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.["] State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). 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. Hall, 371 N.W.2d at 188; Bass, 349 N.W.2d at 500. Substantial evidence means evidence which would convince a rational factfinder that the defendant is guilty beyond a reasonable doubt. Hall, 371 N.W.2d at 188; State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984).

The State acknowledges that Mr. Welsch, the owner, was not asked whether he gave the defendant permission to enter his unlocked home. He testified there was no evidence of forced entry. The defendant lived next to Mr. Welsch for over ten years. Mr. Welsch did not testify as to bad feelings between him and his neighbor, the defendant. He said the patio door was not locked because the lock had been broken for years.

The State argues that the following evidence proves defendant did not have permission to enter the Welsch home:

1. Dillon was not sure who lived in the Welsch home.
2. Dillon ran from the house.
3. Dillon did not state that he had consent when he testified at trial.
4. There was no evidence that the defendant and Welsch had any kind of relationship from which consent would flow.

1. Dillon was not sure who lived in the Welsch home. Mrs. Stevens testified one of the Dillon boys asked her "if Mike was home. He was nodding toward the Welsch residence. I said, 'I don't know a Mike.' He said 'you know, the kid that lives in that house.' I said 'I don't know.' I didn't know if anyone was home."

Mrs. Stevens said the defendant had lived next door to the Welsches for ten years and she had lived next to the Welsches for fourteen years. We conclude this evidence, if it proves anything, proves the defendant did not know at that moment the name of the kid living in the Welsch home. The evidence does not address the issue of whether defendant knew who lived in the Welsch home.

2. Dillon ran from the house. The evidence is sufficient to establish the defendant stole two bows from the Welsch home. We do not have direct evidence as to whether the defendant had permission to be in the Welsch home. The defendant, having just completed a theft, could have had guilty knowledge from the theft causing him to run from the scene of the crime. We fail to find a justifiable inference that the running was prompted by a guilty knowledge of an illegal entry into the Welsch home.

3. Dillon did not state that he had consent when he testified at trial. The sole burden of proof is on the State. The defendant has no burden to prove anything. There is no inference of lack of consent due to the failure of the defendant to testify he had consent to enter the Welsch home.

4. There was no evidence that the defendant and Welsch had any kind of relationship from which consent would flow. We do not agree. The defendant and Welsch lived next door to each other for over ten years. They lived in Letts. Mrs. Stevens testified the population of Letts was approximately 440 people. Mr. Welsch had not fixed the patio door lock that had been broken for several years. These facts convey an image of the kind of small town neighborliness where there is a some possibility of consent to enter the Welsch home.

The trial court in ruling on the motion for acquittal for both charges, burglary and theft, said:

Defendant's motion will be overruled. The court is convinced that a prima facie case has been shown. I might note that there is no specific question or answer in the record to this point with regard to lack of permission of this particular defendant to enter the property; however, the victim of this offense, Mr. Welsch, has referred to it on at least one occasion as a robbery in his house. On another occasion as a burglary. He's repeatedly said his bows were stolen. That, it seems to the court, is sufficient to engender a jury question on that issue.

We agree with the trial court that the evidence was sufficient to submit to the jury the issue of theft. However, we do not find Welsch's statements that a burglary or robbery had occurred in his house to be evidence that he had denied the defendant permission to be in the house. The sheriff's office called Mr. Welsch and told him a burglary had occurred in his home.

There is no evidence Welsch knew the legal significance of the term burglary to encompass the element of lack of the owner's consent for the burglar to enter the house. Robbery, of course, does not have a legal element of consent to enter a house. Welsch's intermixing of the terms burglary and robbery to refer to this particular crime shows he does not understand the legal significance of the terms. The fact that a theft occurs inside a house does not imply the thief lacked permission to be inside the house. Many crimes of theft are committed by people who have permission to be inside a building. We cannot accept the proposition that the fact a theft occurs inside a building there is an

inference that the thief did not have permission to be inside the building.

We find the State has failed to offer sufficient evidence to establish that the defendant entered the Welsch home without the owner's permission. The trial court erred in denying defendant's motion for acquittal. We reverse but do not remand. The burglary charge is dismissed.

REVERSED.

Sackett, J. concurs; Habhab, J. dissents.

HABHAB, J. (dissenting)

I respectfully dissent. A trial court's refusal to direct a verdict for defendant will withstand challenge if there is any substantial evidence in the record tending to support the charge. See State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981). Substantial evidence is such evidence as could convince a rational trier of fact that a defendant is guilty beyond a reasonable doubt. See State v. Robinson, 288 N.W.2d 337, 338 (Iowa 1980). I find that such evidence exists here.

Defendant first approached a neighbor of the Welsches and inquired if a "Mike" was home at the Welsch residence. Upon learning from Ms. Stephens that she did not believe anyone was home at the Welsch residence, defendant went directly to the rear of the residence and stepped onto the Welsches' porch. A few minutes later, Greg Stephens heard the Welsches' patio door slam and the sound of the bows hitting the deck railing. Stephens then saw defendant running across the Welsches' yard with the bows. Mr. Welsch testified that to the best of his knowledge none of the Welsch family was home at the time defendant entered their home.

One must remember that circumstantial evidence is as probative as direct, and either is sufficient to support a conviction. See State v. Blair, 347 N.W.2d 416, 420-21 (Iowa 1984). The record in this case reveals that there

was substantial evidence from which the jury could conclude beyond a reasonable doubt that defendant entered the Welsches' home without permission. I would affirm.