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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed February 22, 1979
vs.	)	
GARY LEE DAVIS,	)	774/61757
Defendant-Appellant.	)	

Appeal from Polk District Court - Ray Fenton, Judge.

Defendant appeals conviction for breaking and entering in violation of § 708.8, The Code 1977. Affirmed.

Kenneth R. Slack, of Slack & Isaac, of Des Moines, counsel for appellant.

Thomas J. Miller, Attorney General of Iowa, Kermit L. Dunahoo, Assistant Attorney General, and Dan Johnston, Polk County Attorney, counsel for appellee.

Submitted to Oxberger, C. J., Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Defendant Gary Lee Davis appeals from his jury conviction of breaking and entering in violation of § 708.8, The Code 1977, resulting from a September 22, 1977 break-in at a Des Moines service station. He contends that the trial court erred in instructing the jury on intoxication as a defense so as to shift the burden of proof to defendant and in refusing to give a requested instruction on the meaning of "intoxication." We find no error and affirm.

The State contends that defendant failed to properly preserve error on his first issue appealed because he did not object to Instruction #12 on the ground that it impermissibly shifted the burden of proof on the element of intent from the State to defendant. We agree. Defendant objected to the first paragraph of Instruction #12 using the following language:

> The defendant would further take exception to the first paragraph of Instruction Number 12 in that it implies to the jury that there has been no evidence other than that adduced by the defendant as to intoxication when in fact it is just the opposite in this case. . . . We would request that it just be reworded to state that evidence has been received that at the time and place of the alleged acts relied upon by the State for conviction the defendant was intoxicated by reason of drugs and alcoholic beverages or both.

An objecting party must point out specifically why he is objecting to an instruction to alert the trial court and allow an opportunity for correction of the error before the instruction is submitted to the jury. State v. Smith, 228 N.W.2d 111, 112 (Iowa 1975); Madison Silas, Division of Martin Marietta Corp. v. Wassom, 215 N.W.2d 494, 501 (Iowa 1974). Here, defendant raises for the first time on appeal his objection to the instruction as shifting the burden of proof. We cannot stretch the language of his objection at trial to encompass his contention on appeal. See State v. Sallis, 262 N.W.2d 240, 248 (Iowa 1978). In any event, the instruction defendant objected to is almost exactly like the instruction approved in State v. Templeton, 258 N.W.2d 380, 381 (Iowa 1977), where the supreme court held the language did not indicate a shift from the State's burden to prove each element of the crime charged.

Defendant also contends that the trial court erred in refusing to give his requested instruction defining "intoxication,"[1] thus allowing each juror to apply his or her individual definition to the facts in the case. We are not convinced that it was necessary for the trial court to instruct on the definition of intoxication. See State v. Ragona, 232 Iowa 700, 704, 5 N.W.2d 907, 910 (1942). In this case intoxication is not a technical term which requires definition, such as "insanity," State v. Thomas, 219 N.W.2d 3, 5-6 (Iowa 1974), or "diminished responsibility," State v. Tensley, 249 N.W.2d 659, 662 (Iowa 1977), but rather, has an ordinary meaning commonly understood. See Ragland v. State, 391 S.W.2d 418, 420 (Texas 1965); Galan v. State, 301 S.W.2d 141, 143 (Texas 1957). However, we believe the trial court's Instruction #12 adequately defined intoxication for the purpose of the jury's consideration of its effect on intent:

INSTRUCTION NO. 12

It is the claim of the Defendant that at the time and place of the alleged acts relied upon by the State for conviction, the Defendant was intoxicated by reason of drugs and alcoholic beverages, or both.

Voluntary intoxication, in and of itself, is not an excuse for commission of a criminal offense. As you have been told in previous instructions a necessary element of the offense charged in the Information is intent.

Intoxication is a defense only when the mental disability produced thereby is such as to render the intoxicated person incapable of forming the requisite criminal intent. Even though one may be under the influence of an intoxicant, he will not be absolved of criminal responsibility if he still possesses mental capacity sufficient to entertain the intent requisite to a particular offense; and one will not be absolved of criminal responsibility if the requisite criminal intent is present in his mind and he then voluntarily becomes intoxicated before committing the act.

In determining whether or not the defendant had the requisite intent, you may consider the evidence of defendant's intoxication along with all the other evidence in the case.

There is no error and the judgment of the trial court is affirmed.

AFFIRMED.

Oxberger, C. J., specially concurs.

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[1] Defendant requested an instruction as follows:

"Intoxication. Intoxication means the condition created by the use of alcoholic beverages, a narcotic, hypnotic or other drug, or any combination of such substances causing such mental and/or physical condition in a person, that his reason or faculties have become effected, or his judgment impaired, or his passions are visibly excited, or whenever the use thereof has caused him to lose control in any manner, or to any extent, of the actions or motions of his person or body."

OXBERGER, C. J. (specially concurring)

I agree with the majority's conclusion that defendant failed to raise the issue he now urges on appeal and I would affirm his conviction on that ground. I do not believe, however, that State v. Templeton, 258 N.W.2d 380, 381 (Iowa 1977), offers supporting authority for the instruction given in the instant case. In Templeton, the last paragraph of the intoxication instruction stated, "You may consider the evidence of intoxication by reason of alcoholic beverages with all other evidence in the case and the lack of evidence on the part of the state, if any, in determining whether or not the state has proved the defendant guilty beyond a reasonable doubt." 258 N.W.2d at 381. Thus, the jury was told expressly to consider the intoxication evidence together with all the other evidence in determining whether the State met its burden. In the instant case, the pertinent part of trial court's intoxication instruction merely stated, "In determining whether defendant had the requisite intent, you may consider the evidence of defendant's intoxication along with all other evidence in the case. The latter instruction, unlike the language in Templeton, fails to mention the State's retention of the burden of proof.