IN THE COURT OF APPEALS OF IOWA

FILED
MAR 16 1989
CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

TERRY LEE BOUDEWYN,

Defendant-Appellant.

8-603
87-1666

256

Appeal from the Iowa District Court for Lee County (Cr. No. 1669(S)0787), R. David Fahey, Judge.

The defendant appeals from his conviction, following a jury trial, for burglary in the second degree. **REVERSED AND REMANDED.**

William L. Wegman, State Public Defender, and Raymond E. Rogers, Assistant Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Ann E. Brenden, Assistant Attorney General; and Michael P. Short, County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Hayden, JJ.

OXBERGER, C.J.

257

Teresa Russell loaned $20 to William Winn. After her repeated requests for repayment met with no success, she enlisted the aid of Defendant Terry Boudewyn to help her collect the debt. Russell and the defendant went to Winn's apartment, found the door unlocked, and entered. They asserted that they had made an appointment with Winn to discuss the debt and that Winn had told them to enter the apartment and wait if no one was home. Winn denies making such an appointment or giving the two permission to enter. Once inside the apartment, Russell and the defendant took a television set and some pictures. They contend that they took only items of a value roughly equal to the $20 debt, and that they took items only to satisfy the debt.

Defendant was convicted by a jury of burglary in the second degree. Defendant challenges the sufficiency of evidence and asserts he was entitled to a "claim of right" defense. He also contends he was rendered ineffective assistance of counsel with respect to this "claim of right" defense. Finally, he contends the trial court erred in failing to instruct the jury on criminal trespass as a lesser-included offense. We reverse and remand for a new trial.

I. LESSER-INCLUDED OFFENSE

Defendant contends the district court should have instructed the jury on criminal trespass as a lesser included offense of second-degree burglary.

On this issue, the State concedes that criminal trespass meets the legal test as a lesser included offense of second-degree burglary. The State's only contention is that it does not meet the factual test. Our supreme court recently modified our approach to the lesser-included offense doctrine by holding that when the legal test is met, the factual test is met as a matter of law. State v. Jeffries, 430 N.W.2d 728 (Iowa 1988). Failure to instruct on requested lesser-included offenses, which meet the test as outlined in Jeffries, is reversible error. State v. Mount, 422 N.W.2d 497, 501 (Iowa 1988); See Iowa R. Crim. P. 6(3). Therefore, defendant's conviction of burglary in the second degree must be reversed and remanded for a new trial.

II. CLAIM OF RIGHT

Because the issue of defendant's entitlement to a "claim of right" defense may arise on retrial, we address the issue now. From the evidence at trial, the jury could have found the following facts: In early June 1987, Teresa loaned twenty dollars to a friend, William Winn. Despite his promise to the contrary, the loan had not been repaid as of June 29, 1987. For Winn's failure to repay this debt, Teresa Russell asked the Defendant Terry Lee Boudewyn to assist her in going to Winn's house and taking something valued at twenty dollars. The two went to Winn's house, and when it was determined that no one was home they entered the house. There was evidence that the door had

been broken. Teresa Russell and the defendant took Mr. Winn's television and several pictures from the wall. They later sold the television for ten dollars. The remaining pictures that were taken were spotted being dropped out of Teresa Russell's apartment window to the defendant. There was no evidence that either Russell or Boudewyn had been given or thought they had been given permission to take anything from the Winn home.

The defendant asserts the evidence shows that he had permission to enter the victim's apartment and that he took items from the apartment under a "claim of right" to satisfy a debt owed by the victim. There is no evidence that either the defendant or Russell had permission to enter the Winn home. To support his "claim of right" assertion, defendant relies on State v. Schmidt, 239 Iowa 440, 30 N.W.2d 473 (1948). However, this case can be distinguished from Schmidt. In Schmidt, the parties were landlord and tenant who had made as part of their lease agreement provisions whereby the landlord was entitled to two-fifths of all oats raised by the tenant and, if the tenant did not deliver, the landlord could enter the land and remove them. Id. at 474.

In the case at bar, the defendant had no right to the items, nor did he have permission to enter the victim's home. The statute authorizing the claim of right provides that a person must reasonably believe he has a right, privilege, or license to take the property. Iowa Code §

714.4 (1987). The State asserts, and we agree, that no person could reasonably believe that he or she had a right to enter another's home, in that person's absence, and take whatever property was believed to equal the value of a debt between the remover's friend and the absent homeowner. This court is not willing to set forth a policy of application of the claim of right doctrine under such circumstances.

III. SUFFICIENCY OF EVIDENCE

Defendant also raises a challenge of the sufficiency of the evidence to support his conviction. As a successful claim of insufficiency of evidence necessitates dismissal, we address this issue.

When reviewing the sufficiency of evidence, we view the evidence in the 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 to support the charge. 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. (Citations omitted.)

The evidence at trial, as it could have been viewed by the jury, has been set out in Division II of this opinion. Defendant was convicted of burglary in the second degree in

violation of Iowa Code Section 713.5. As such, it was necessary to prove that defendant unlawfully entered the Winn home with intent to commit theft. We conclude that the record contains substantial evidence to support the conviction.

For the reasons stated in Division I, we reverse and remand for a new trial. Because we reverse on this issue, we need not reach defendant's claim of ineffective assistance of counsel.

REVERSED AND REMANDED.