

IN THE COURT OF APPEALS OF IOWA

No. 0-23 / 89-332

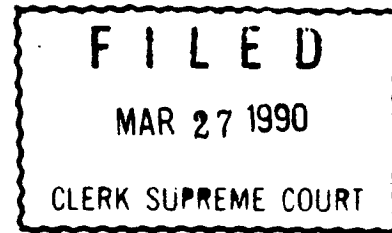
STATE OF IOWA,

Appellee,

vs.

KENNETH DEAN WEAVER, JR.,

Appellant.



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Appeal from the Iowa District Court for Polk County,
George W. Bergeson, Judge.

The defendant appeals his conviction, following a jury
trial, for second-degree burglary. **AFFIRMED.**

David D. Butler, Des Moines, for the appellant.

Thomas J. Miller, Attorney General; Mark Joel
Zbieroski, Assistant Attorney General; James A. Smith,
County Attorney; D. William Thomas, Assistant County
Attorney; for plaintiff-appellee.

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

SCHLEGEL, J.

The defendant, Kenneth Weaver, appeals his conviction for second-degree burglary. He contends the elements of burglary were not established and that the victim's in-court identification was tainted by an earlier photographic line-up. We affirm the conviction.

Julie Wilson drove her car to a convenience store's gas pump, parked, and put gas in the car. She then went inside the store to pay for the gas, leaving the car windows open, and leaving her two small children in the car. While Wilson was inside the store, an individual reached into the car and removed Wilson's purse (containing about \$25) from the back seat floor area of the car.

The defendant was charged with second-degree burglary. After a jury trial, he was convicted of that crime and sentenced as an habitual offender.

Weaver has appealed his second-degree burglary conviction.

Weaver contends the State's evidence failed to establish one of the elements of burglary, namely entry into an occupied structure. He argues that a car with open windows, under the circumstances of this case, is not an "occupied structure" within the meaning of Iowa Code section 713.1. He argues that he only should have been found guilty, if at all, of theft in the fifth degree.

Weaver also challenges the admission of Julie Wilson's testimony identifying him as the perpetrator. He argues that Wilson's in-court identification was tainted by an earlier photographic line-up which was impermissibly suggestive. To support his claim of prejudice, Weaver alleges that Julie Wilson was initially hesitant at the photographic line-up and did not make a confident identification until her trial testimony.

The State asserts, among other things, that Weaver failed to preserve error on some of his issues. Weaver responds (1) that he believes error was preserved on all issues, but (2) that any failures to preserve error resulted from ineffective assistance of trial counsel and should therefore be disregarded.

This is an action at law and, as such, our scope of review is on assigned error only. Iowa R. App. P. 4.

Defendant contends that a privately owned automobile is not an occupied structure within the meaning of Iowa Code section 713.1. In addition to this statutory construction issue, defendant contends he was denied due process because he was not placed on notice that reaching into the auto could fall under the burglary statute.

The case of State v. Buss, 325 N.W.2d 384 (Iowa 1982), essentially laid the question of whether an automobile is an occupied structure to rest. In Buss, the defendant alleged that the cab portion of a pickup truck was not an

occupied structure. The supreme court held that it was an occupied structure within the meaning of the burglary statute. Id. at 386. In its rationale, the court cited with approval the following statement:

That an automobile is not primarily used for storage or safekeeping of property should not exclude an ordinary automobile from coverage under the burglary statute, as the statute does not contain such qualifying language as a vehicle primarily used for the storage or safekeeping of property.

Id. (citing K. Dunahoo, The New Iowa Criminal Code, 29 Drake L.Rev. 237, 358 (1979-80)).

There is no rational basis for treating a pickup truck differently from a car under the burglary statute. The language in Buss, while specifically dealing with a pickup, was clearly intended to include most automobiles. We hold the car is an occupied structure under the Iowa burglary statute.

The due process issue is also without merit. A statute is unconstitutionally vague, and thus offends due process, if it does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so he may act accordingly. State v. Jaeger, 249 N.W.2d 688, 691 (Iowa 1977). A statute is not vague if the meaning of the words used and the standards they establish can be fairly ascertained by reference to similar statutes, other judicial determinations, reference to common law, to the dictionary, or if the words themselves have a common and

generally-accepted meaning. State v. Wagner, 410 N.W.2d 207, 214-15 (Iowa 1987). The Buss case is obviously another "judicial determination." A person of ordinary intelligence would be placed on notice that an automobile could be an occupied structure.

Defendant also claims the trial court should have given his requested instruction regarding his theory of the case. Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978). However, the trial court's ruling regarding this decision will not be disturbed absent an abuse of the trial court's discretion. State v. Christensen, 323 N.W.2d 219, 222 (Iowa 1982); State v. Lewis, 391 N.W.2d 796, 798 (Iowa App. 1986). We will not find an abuse of discretion unless "such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Id. The burden of proving abuse of discretion lies with the defendant. Id. Defendant has not carried his burden on this issue. Given the evidence presented in this case, we cannot say that the trial court abused its discretion in refusing to give the requested instruction.

Defendant's final contention is that the photographic identification procedure was impermissibly tainted. He bases this argument on the statement by an officer that the

victim was "not exactly positive" in her identification of the defendant at the police station. First, we must determine whether the out-of-court identification procedure was "impermissibly suggestive." State v. Rawlings, 402 N.W.2d 406, 409 (Iowa 1987) (citing Mansen v. Brathwaite, 432 U.S. 98, 108-09, 97 S. Ct. 2242, 2250, 53 L. Ed. 2d 140, 150 (1977)). There is no evidence of overly-suggestive procedures. The defendant's arguments on this issue would be more properly made before a jury. They go to the weight of the evidence, not its admissibility. The identification procedure was not impermissibly suggestive and the defendant's conviction is affirmed.

AFFIRMED.