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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

vs.

VINCENT DUNCAN,

Defendant-Appellant.

Filed June 30, 1981

1-16
64531

Appeal from Scott District Court - Robert K. Stohr, Judge.

Defendant appeals his conviction of burglary in the second degree in violation of section 713.3, The Code. REVERSED AND REMANDED FOR A NEW TRIAL.

Jerald Feuerbach of Gomez, Feuerbach, May & Pries, Davenport, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Merle Wilna Fleming, Assistant Attorney General, for plaintiff-appellee.

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

PER CURIAM

Defendant appeals his conviction of burglary in the second degree in violation of section 713.3, The Code. He claims that the trial court erred in allowing into evidence a palm print which was not connected to him in any way, in failing to grant his motions for directed verdict on the ground that the State failed to prove the essential elements of the offense charged, and in instructing the jury such that they need not reach unanimous agreement as to which of two premises was burglarized. We reverse and remand for a new trial

I.

Defendant was charged by information on September 12, 1979, with the crime of second degree burglary of the Lindsey Boat Club in Davenport and a boat owned by Marcus Low. Defendant filed a motion in limine on November 11, 1979, seeking to prohibit the introduction of evidence relating to the fact that a palm print was found on the Low boat. This motion was overruled at trial held on November 29, 1979. The jury returned a verdict of guilty that same day. Defendant's subsequent motions for new trial and in arrest of judgment were denied, and he brought this appeal.

II.

At trial, Dennis Kern, a Davenport police officer and evidence technician, testified over defendant's objection that he found a palm print on Low's boat the morning of September 2, 1979, when defendant was apprehended in the boat yard. Defendant claims that this evidence was irrelevant and had no probative value since there was no direct connection drawn between him and the print. We disagree. We first note that the trial court has broad discretion in determining questions of relevancy and materiality of evidence. State v. Mark, 286 N.W.2d 396, 412 (Iowa 1979). The test for relevancy is whether the evidence "logically tend[s] to establish any material proposition." Id.; State v. Clay, 213 N.W.2d 473, 477 (Iowa 1973). Kern testified that the Low boat was very clean except for the palm print which could not have been more than two days old at that time. The owners of a nearby boat who were awakened by an alarm that morning testified that they saw defendant running from where the Low boat was docked. Under these circumstances, we believe that a jury could logically infer that the print came from defendant. "Evidence should be received if it is logically probative of some matter that needs to be proved, unless there is a clear policy or rule of law that

excludes it." Mark, 286 N.W.2d at 412. Defendant has indicated no such policy or rule requiring exclusion of this evidence. The trial court did not abuse its discretion in allowing its introduction.

III.

Defendant next contends that his motion for directed verdict of acquittal at the close of the State's case and at the close of trial should have been sustained. He argues that the record contained insufficient evidence to allow a jury to find him guilty of second degree robbery. We view the evidence in the light most favorable to the prosecution and examine all of the evidence to determine its sufficiency to support the guilty verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

Mary Ann Ketelsen, an occupant of a nearby boat, saw defendant running away from the Low boat. She and her husband saw defendant run through the Lindsey Park Yacht Club. The club is surrounded by a high fence, topped with barbed wire, and by gates which are kept locked. Marcus Low testified that no one had a right to be on his boat on the morning of September 2, 1979. Defendant himself testified that he "could have been" on the boat that morning. His intent to commit theft may be inferred from the actual breaking and entering of an enclosed area containing things of value. State v. Morelock, 164 N.W.2d 819, 822 (Iowa 1969). The trial court properly overruled defendant's motion for directed verdict.

IV.

Defendant also claims that the trial court erred in submitting instruction number six under which he argues, it was possible for the jury to find him guilty without reaching unanimous agreement as to which area was burglarized.

The challenged instruction reads in part as follows:

> Before the Defendant can be found guilty of Burglary in the Second Degree the burden is upon the State to establish by the evidence beyond a reasonable doubt each and all of the following propositions:
>
> 1. That on or about the 2nd day of September, 1979, in Scott County, Iowa, the Defendant either entered or remained in at a time when the same was closed to the public, a boat owned by one Marcus Low or the premises known as the Lindsey Yacht Club.

We agree that instruction number six did not require the jury to unanimously agree that one of the specific crimes charged had been committed by defendant. Some jurors could have found that defendant committed burglary when he entered the premises of

the Lindsey Yacht Club, while others may have aquitted defendant of this crime but found that he committed burglary by entering Marcus Low's boat. In State v. Williams, 282 N.W.2d 248 (Iowa 1979), the Supreme Court approved an instruction that allowed alternative juror findings on the mental elements required for commission of a crime. But in this case the required elements pertain to two separate crimes. We also note that the burglary offenses alleged to have been committed at the Lindsey Yacht Club and on Marcus Low's boat involved two different owners. For this reason the breaking of a close as an element of one crime would not necessarily prove that this element of the other burglary charged had been satisified.

The state argues that error was not preserved on this point since defense counsel did not object to the instruction as finally submitted. However, the court's attention to this matter was called by defense counsel's requesting interrogatories to the jury. The interrogatories undertook to assure that the jury reached a unanimous verdict that all of the elements of one of the crimes charged were proved to have been committed by defendant. The trial court denied the request for interrogatories. There is no doubt the trial court was fully apprised of the error in this instruction.

REVERSED AND REMANDED FOR A NEW TRIAL.

Carter, J., and Donielson, J. dissent.

CARTER, J. (dissenting)

I dissent. Defendant clearly failed to preserve error on the content of the trial court's marshalling instruction to the jury. Not only did he not object to the instruction, but affirmatively advised the court that he had no objection thereto. Every ground of exception which is not particularly specified is lost on appeal. State v. Droste, 232 N.W.2d 483, 487 (Iowa 1975). An objection which might have been supported by a legitimate reason, but was not, cannot support reversal. State v. Winquist, 247 N.W.2d 256, 259 (Iowa 1976).

The majority concludes that defendant's request that special interrogatories be given to the jury serves as an effective substitute to making an appropriate objection to the marshalling instruction. This is not correct. Defendant's stated theory in asking for the special interrogatories was to test the jury's verdict against the instruction based on the evidence presented in the case. Stated somewhat differently, it was defendant's apparent intent in asking for the interrogatories to accept the alternative elements submitted in the marshalling instruction and to lay the foundation (through the interrogatories) for showing that a guilty verdict was based upon those alternative elements of the instruction which were lacking in evidentiary support. Failure of the trial court to submit these interrogatories deprived the defendant of this opportunity. But if this was trial court error, it must be asserted on appeal by assigned error with respect to the failure to submit the interrogatories. Defendant does not make any such claim on appeal. Instead, he makes the claim never urged in the trial court. This record does not support a reversal on the grounds relied upon by the majority of the court.

On the merits of the defendant's claim that the marshalling instruction permitted the possibility of a nonunanimous verdict on essential elements of the crime, I find such contention to be unconvincing. This is a case involving entry of concurrent closes for purposes of the law of burglary. Under such circumstances, the alternative manner for commission of the offense recognized by the marshalling instruction was not improper. It is not necessary that a jury in a criminal case in order to return a verdict of conviction must concur in a single view of the transaction disclosed by the evidence. See Holland v. State, 91 Wis. 2d 134, 139, 280 N.W.2d 288, 292 (1979); see also United States v. UCO Oil Co., 546 F.2d 833, 838 (9th Cir. 1976), cert. denied 430 U.S. 966, 97 S.Ct. 1646, 52 L. Ed. 2d 357.

The other assignments of error are also without merit. I would affirm the conviction and sentence.

Donielson, J., joins in this dissent.