IN THE COURT OF APPEALS OF IOWA

No. 0-245 / 09-1141
Filed May 12, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DUSTIN ELLIOTT WILLIAMS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Donald C. Nickerson (trial) and Artis Reis (sentencing), Judges.

Dustin Williams appeals his conviction and sentence for burglary in the third degree. **AFFIRMED.**

Gary Dickey, Jr. of Dickey & Campbell Law Firm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, and James Ward, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Doyle, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

DOYLE, J.

Dustin Williams appeals following his conviction and sentence for burglary in the third degree, in violation of Iowa Code section 713.1 and 713.6A (2007). He contends the district court erred by instructing the jury on the theory of joint criminal conduct and that the evidence was not sufficient to establish the "breaking" element of the crime of burglary. Upon our review, we affirm.

***I. Background Facts and Proceedings*.**

While his son was out of town, Polk County Deputy Sheriff Boucher was taking care of his son's house. At about 2:00 a.m. on October 1, 2008, Boucher received a call from a local security company and was told the burglar alarm had gone off at the son's house. Boucher drove to the property and discovered that the kitchen door was standing open and a basement window had been pried out. In addition, the glass had been broken out of one of the windows of the detached garage's three-season porch. Boucher and his oldest son repaired the damage to the house and used ten to fifteen screws to fasten a piece of plywood over the broken porch window. Boucher left the property at about 3:30 a.m. and returned to his own home. When he could not get to sleep, he decided to go to work. On the way, at about 5:30 a.m., he drove past his son's house to check on it. He observed an unfamiliar car parked in the driveway. He saw two people get out of the car, go through a gate, and walk over to the boarded up window. He saw them begin to pull on the plywood. Boucher drove around the block to avoid alerting the two people and to give himself time to contact Des Moines police. He approached the house again and drove his car into the driveway and parked, blocking the other car. He reached into the other car and removed its ignition

key. Boucher went through the gate and when he came around a corner he saw two people running. He placed himself between the car and the fence and waited a few minutes. He then heard someone running down the street, and as he stepped out, he saw the two people who had just run from the house. They were coming back towards the driveway. Boucher pulled out his side arm, drew down on the individuals, and ordered them to halt. Des Moines police officers arrived shortly thereafter and took the two into custody. One of the individuals was Dustin Williams. Boucher identified Williams as one of the men he saw breaking into the window of the three-season porch. Darious Cooper was Williams's accomplice.

The State charged Williams with two counts of third-degree burglary, one count based on the 2:00 a.m. incident and the other on the 5:30 a.m. incident. A jury acquitted Williams of all charges associated with the 2:00 a.m. incident, but found him guilty of third-degree burglary based on the 5:30 a.m. incident. Williams was later sentenced as a habitual offender to a term of imprisonment not to exceed fifteen years to run concurrently with the sentence on another charge.

Williams appeals.

***II. Standards of Review*.**

Challenges to jury instructions are reviewed for corrections of errors at law. *State v. Heemstra,* 721 N.W.2d 549, 553 (Iowa 2006). On review, we determine whether the challenged instruction accurately states the law and is supported by substantial evidence. *State v. Predka*, 555 N.W.2d 202, 204 (Iowa

1996). An instructional error does not require reversal unless it caused prejudice to the defendant. *State v. Reynolds*, 765 N.W.2d 283, 288 (Iowa 2009).

Our review of the district court's ruling on the motion for judgment of acquittal and sufficiency of the evidence is also reviewed for corrections of errors at law. Iowa R. App. P. 6.907 (2009). In reviewing challenges to the sufficiency of the evidence supporting a guilty verdict, we consider all of the evidence in the record in the light most favorable to the State and make all reasonable inferences that may fairly be drawn from the evidence. *State v. Keeton*, 710 N.W.2d 531, 532 (Iowa 2006). A jury's verdict is binding on appeal if it is supported by substantial evidence. *State v. McFarland*, 598 N.W.2d 318, 320 (Iowa Ct. App. 1999). "If a rational trier of fact could conceivably find the defendant guilty beyond a reasonable doubt, the evidence is substantial." *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000). A jury verdict of guilty can be supported by circumstantial evidence. *State v. Moses*, 320 N.W.2d 581, 586 (Iowa 1982).

***III. Discussion*.**

***A. Instruction on Joint Criminal Conduct*.**

Williams argues the district court erred in instructing the jury on the theory of joint criminal conduct.[1] The State agrees the instruction should not have been given because there was no evidence Williams and Cooper participated in any crime other than the burglary itself. *See State v. Smith*, 739 N.W.2d 289, 294 (Iowa 2007). But, the State claims Williams failed to preserve the issue for appeal, and even if he had, the State argues submission of the instruction was not reversible error. Sidestepping the error preservation issue, we agree that

[1] *See* Iowa Criminal Jury Instruction 200.7 (2009) and Iowa Code section 703.2.

submission of the instruction was not reversible error. Having acquitted Williams of the 2:00 a.m. burglary and all lesser-included offenses stemming therefrom, the jury necessarily found that Williams was involved in only one crime either as principal or aider and abettor. Under such circumstances, submission of the instruction on joint criminal conduct was not reversible error. *See State v. Jackson*, 587 N.W.2d 764, 766 (Iowa 1998) (citing *State v. Thompson*, 397 N.W.2d 679, 685-86 (Iowa 1986); *State v. Kern*, 307 N.W.2d 22, 28 (Iowa 1981)).

***B. Sufficiency of Evidence*.**

Arguing the district court erred in failing to grant his motion for judgment of acquittal, Williams claims there was insufficient proof to establish the "breaking" element of burglary. He notes that although the plywood was pulled away a few inches from the frame of the broken porch window, it was not removed entirely. Williams suggests that the plywood would have to have been removed entirely, or that he broke the external threshold or had a part of his body inside the building before a "breaking" could be established. He asserts

> this case is unique in the annals of Iowa law, as far as diligent legal research can reveal, insofar as Williams is the only defendant ever convicted of burglary in Iowa based on a theory of "breaking" that was not accompanied by subsequent entry into an occupied structure.

He agrees his trial counsel was correct in suggesting the facts established an attempted burglary at best.

Prior to the enactment of the current Iowa Criminal Code,[2] both a breaking *and* entering were required to prove the crime of burglary.[3] Now, proof of either

[2] 1976 Iowa Acts Ch. 1245 (effective January 1, 1978).
[3] *See*, *e.g.*, Iowa Code § 708.1 (1977).

a breaking or an entering will establish the crime of burglary, as the applicable Iowa Code section provides:

> Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public, or who remains therein after it is closed to the public, or after the person's right, license or privilege to be there has expired, *or* any person having such intent who breaks an occupied structure, commits burglary.

Iowa Code § 713.1 (emphasis added). Neither breaking nor entering are defined in the Iowa Criminal Code, however the terms are defined in the Iowa Criminal Jury Instructions.

> The term "breaks" or "broke" means removing or putting aside any obstruction to enter a structure. No damage need result to the property. For example, the pushing open of an unlatched or partially-opened door to gain entry would be "breaking" within the meaning of the law.

Iowa Crim. Jury Instruction 1300.11. "'To enter' means entering a structure with any part of the body, or with an instrument intended to be used to commit a felony, assault or theft." Iowa Crim. Jury Instruction 1300.12. Both instructions were given to the jury.

We have said that "entering" is legally synonymous with "breaking" and their definitions embody each other under burglary law. *See State v. McCall*, 754 N.W.2d 868, 873 (Iowa Ct. App. 2008). But, that is not to say that a "breaking" requires an entry. Our supreme court has defined "breaking" as "making an opening into a building by trespass and occurs when an intruder removes or puts aside some part of the structure relied on as an obstruction to intrusion. Opening an entrance door is a breaking." *State v. Hougland*, 197 N.W.2d 364, 365 (Iowa

1972). The jury was properly instructed on the definition of breaking through the district court's submission of Iowa Criminal Jury Instruction 1300.11.

Viewing the evidence in the light most favorable to the State and making all reasonable inferences that may fairly be drawn from the evidence, we find the jury could not have reasonably found that Williams broke into the structure. Unfortunately, we do not have a photograph of the plywood as it was observed after the 5:30 a.m. incident, but we do have witnesses' descriptions. Boucher testified the "plywood had been pretty much pulled off the window. It was hanging by one screw, I believe." Des Moines Police Department identification technician Wilcutt testified the plywood "was pulled out from the frame. You could see the nails had been pulled. I believe it was the bottom right corner and the bottom right side had been pulled away." She agreed that it was "still hanging there." On cross-examination Wilcutt agreed "the plywood had only been pulled away a few inches" and that "because it had only been pulled away a few inches, it would not be big enough yet for someone to get into the window." She further agreed that the bottom right-side of the plywood had been pried up just a few inches. From these descriptions we conclude the plywood had not been "removed" or "put aside," nor was an "opening" created. Thus we find the jury could not have reasonably found that Williams broke into the Boucher structure. But that does not end our inquiry since the crime of burglary may be proven based upon the breaking *or* entry into an occupied structure.

Williams argues "it is undisputed that [he] did not 'effect an entry.'" The State counters that it is reasonable to infer that Williams, in reaching behind the plywood to pull on it, had to have reached into the enclosed area of the porch

with his hands, thus "breaking the plane of the threshold" of the structure and thereby effectuating an "entry" into the structure with a part of his body. *See State v. Pace*, 602 N.W.2d 764, 773 (Iowa 1999). We agree with the State that this is a reasonable inference, and, considering all of the evidence in the record in the light most favorable to the State and making all reasonable inferences that may fairly be drawn from the evidence, we conclude the jury could conceivably have found the defendant guilty beyond a reasonable doubt based upon this circumstantial evidence. Thus, there was substantial evidence that could convince a rational trier of fact that Williams was guilty of the crime charged beyond a reasonable doubt. We therefore conclude the district court did not error in denying Williams' motion for judgment of acquittal, and we accordingly affirm.

AFFIRMED.