

IN THE COURT OF APPEALS OF IOWA

No. 1-431 / 10-1862
Filed June 29, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ALLAN NOLEN HAMMA,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Paul L. Macek,
Judge.

Defendant appeals his conviction for second-degree criminal mischief.

REVERSED AND REMANDED WITH DIRECTIONS.

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, Michael J. Walton, County Attorney, and Jay R. Sommers, Assistant
County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

EISENHAUER, P.J.

Allan Hamma appeals from his conviction and sentence following a jury verdict finding him guilty of second-degree criminal mischief. Criminal mischief is defined as the intentional damage, defacing, alteration, or destruction of property by one who has no right to so act. Iowa Code § 716.1 (2009). Hamma damaged an air conditioning unit on Robert Martin's commercial property. On appeal Hamma argues: (1) there is insufficient evidence of the cost to replace, repair, or restore the damaged air conditioning unit; (2) the court considered improper factors in sentencing him; and (3) the court erred in ordering him to pay attorney fees above statutory limits.

Following the close of the State's evidence at trial, Hamma made a motion for judgment of acquittal, or in the alternative, sought submission of fifth-degree criminal mischief as the maximum charge. Hamma argued:

Now, if we take a look at . . . the radiators from the air conditioning unit . . . we don't know anything from the testimony in this case as to what it would take to repair the unit. Can these . . . radiators . . . be reinstalled at minimal cost? We don't know. Could it be repaired for \$50, \$75, \$100? . . . [W]e don't know based on the competent evidence . . . what it would cost to put the air conditioning unit . . . back in working order.

We know the purchase of the unit itself, exclusive of . . . installation costs . . . was at some point in time \$1600. That's based on the testimony of Mr. Martin. Again, we don't know. Do we need to buy a brand new one? If we need to buy a brand new one, how much do we have to pay for that? . . . We don't know and we'd have to speculate in order to come up with that dollar figure.

The district court denied Hamma's motion, and the jury was instructed on criminal mischief in the second, third, fourth and fifth degrees.

First, we consider whether there was sufficient evidence presented at trial to establish the cost of replacing, repairing or restoring Martin's damaged

property. See *id.* We review challenges to the sufficiency of the evidence to support a conviction for corrections of errors at law. *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005). “We uphold a verdict if substantial evidence supports it.” *Id.*

The State must prove every element of the crime charged beyond a reasonable doubt. *State v. Williams*, 674 N.W.2d 69, 71 (Iowa 2004). Hama was convicted of second-degree criminal mischief, which requires the State to prove damages exceeding \$1000 but not exceeding \$10,000. See Iowa Code § 716.4. Third-degree criminal mischief requires proof of damages between \$500 and \$1000 and fourth-degree criminal mischief requires proof of damages between \$200 and \$500. Iowa Code §§ 716.5, .6. Criminal mischief in the fifth degree is: “All criminal mischief which is not criminal mischief in the first degree, second degree, third degree, or fourth degree.” *Id.* § 716.6.

We conclude there is not substantial evidence by which a rational jury could determine “the cost of replacing, repairing, or restoring the property” exceeds a fifth-degree criminal mischief charge. At trial, Martin testified the air conditioning unit originally cost \$1600 and his total cost of purchase plus installation was “[s]omewhere around \$8100.” However, Martin did not testify to when the unit was purchased or installed. Other evidence showed Martin had owned his *land* prior to 1979 and constructed the six buildings on the land. There was no evidence as to when Martin constructed the building being cooled by the damaged unit. While Martin testified he had not fixed the air conditioning unit yet because “I’m retired, I don’t have that kind of money”; the State presented no evidence on the estimated amount to repair, replace or restore the

air conditioning unit. Further, the State presented no evidence as to the value of the unit at the time it was damaged.

Because there was not substantial evidence presented to support Hamma's conviction for second-degree criminal mischief, the district court erred in denying his motion. Accordingly, we reverse Hamma's conviction for second-degree criminal mischief and remand with directions to enter a conviction for fifth-degree criminal mischief.

Second, Hamma argues the district court utilized improper factors in sentencing him. The State agrees "resentencing is necessary." Because our remand for a conviction for fifth-degree criminal mischief requires resentencing, we do not address this issue further.

Third, Hamma argues his sentence is illegal under *State v. Dudley*, 766 N.W.2d 606, 621-23 (Iowa 2009), because he "cannot be required to reimburse the State for the expense of his court-appointed attorney in amount above the fee limitation." The State agrees that under *Dudley*, Hamma cannot be ordered to repay more than \$1200 in attorney fees; but asserts "the fees taxed to Hamma are unclear on this record." We agree the fees taxed are unclear. Because our remand requires resentencing, we do not address this issue further.

REVERSED AND REMANDED WITH DIRECTIONS.