

IN THE COURT OF APPEALS OF IOWA

No. 8-235 / 07-0985

Filed May 29, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PERRY BERNARDO BENDER,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Joel E. Swanson,
Judge.

Defendant Perry Bender appeals following his conviction of burglary in the
second degree and stalking in violation of a no-contact order. **AFFIRMED.**

James Cook of Parrish, Kruidenier, Dunn, Boles, Gribble, Cook, Parrish,
Gentry & Fisher, L.L.P, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney
General, Laura Roan, Assistant Attorney General, Timothy N. Schott, County
Attorney, and Ricki Osborn, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

SACKETT, C.J.

Defendant Perry Bender appeals following his conviction of burglary in the second-degree and stalking in violation of a no-contact order. He contends his trial counsel was ineffective (1) in not objecting to the second-degree burglary instruction and (2) in not requesting an instruction on jury unanimity. He also contends the evidence was insufficient to establish that he committed either of the crimes. We affirm.

Defendant was charged by trial information with stalking Danita Walker in the month of January of 2007 and burglarizing her home on January 20th of the same year. Following a jury trial defendant was convicted of both offenses.

The marshalling instruction allowed the jury to find the burglary could have occurred any time between January 1 and 20.

Defendant contends his trial attorney should have objected to the marshalling instruction because while the State charged him with a burglary alleged to have occurred on January 20, 2007, the jury instruction stated a date range of January 1 and 20, 2007, and his trial attorney did not request a jury instruction on unanimity. He advances there was evidence elicited at trial that the alleged victim and defendant had physical contact on at least seven occasions in the same time frame within the same occupied structure the State claims he burglarized.

The defendant's argument is similar to the one rejected in *State v. Duncan*, 312 N.W.2d 519 (Iowa 1981). Having determined there was no error in the instruction, there is no basis to determine the defendant's trial attorney was ineffective in not objecting to it. To prove a claim of ineffective assistance of

counsel, defendant must show by a preponderance of the evidence that his trial counsel failed to perform an essential duty. *State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006).

Defendant also contends there is not substantial evidence to support a finding of guilt beyond a reasonable doubt. We review the evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence. *State v. Petithory*, 702 N.W.2d 854, 856 (Iowa 2005). There clearly is substantial evidence to support the verdict.

AFFIRMED.