**IN THE COURT OF APPEALS OF IOWA**

No. 6-951 / 06-0025
Filed December 28, 2006

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**DARRELL ALLEN SHOWENS,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Scott County, David H. Sivright, Jr., Judge.

Darrell Allen Showens appeals his conviction for attempted burglary in the second degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas Andrews, Assistant Attorney General, William E. Davis, County Attorney, and Julie Walton, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., Vogel, J., and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

**HUITINK, P.J.**

Darrell Allen Showens appeals his conviction for attempted burglary in the second degree. He claims the evidence is not sufficient to support his conviction. Showens also claims prosecutorial misconduct necessitating a new trial. We affirm.

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

Holly Bierman called the police after she heard noises outside her bathroom window and saw someone outside her bedroom window moving or attempting to remove the air conditioner. Lori Walker, the responding police officer, found Showens with his hands on the outside wall of Bierman's apartment house looking in an apartment window. Walker would later testify that Showens told her he had been drinking with friends earlier and was riding his bicycle home when he decided to walk for awhile to sober up. Walker's subsequent questioning also indicated Showens could not recall the address of the residence where he was drinking with his friends, nor was his presence near Bierman's apartment building consistent with the most direct route to his stated home address. Showens also told Walker he was looking in the windows so he could see a clock to determine the correct time. Walker testified Showens was wearing a watch and, contrary to his claims, did not appear to be nor did a subsequent breath test indicate he was intoxicated. Showens's bicycle was located nearby. Investigators subsequently found an inverted chair under Bierman's window. Showens's fingerprint was found on Bierman's window air conditioner.

At the close of the evidence, Showens's counsel moved for a judgment of acquittal. Counsel argued the evidence was not sufficient to establish Showens's intent to commit an assault or theft. The trial court's resulting ruling states:

> The motion is denied. The Court finds that a jury question is generated by the circumstantial evidence in this case, which includes the fact that the area was not well lit. There is evidence from which the jury could find the Defendant had been there before and had ascertained that fact; that his bicycle was left some distance from the area where the alleged victim resided; the hour of the early morning. This is circumstantial evidence from which the jury could conclude that the intent was to break or enter and commit a crime, specifically a –- a theft or assault on the property. So the -– the motion is denied. And that -– that should be considered renewed after the defense also rested without calling witnesses. The same motion would be considered made at the close of all evidence and resisted, and the same ruling would apply.

The jury returned a verdict finding Showens guilty as charged. Showens's posttrial motions were denied, and Showens was sentenced as an habitual offender to a term not to exceed fifteen years.

On appeal, the appellate defender raises the following issue on Showens's behalf:

> I. The record contains insufficient evidence to support defendant's conviction for attempted burglary in the second degree.

Showens has filed a pro se brief in which he makes the following arguments:

> I. The record contains insufficient evidence to support defendant's conviction for attempted burglary in the second degree.
> II. Prosecuting attorney engaged in prejudicial misconduct at the trial during her closing arguments to the jury.

***II. Standard of Review.***

We review a sufficiency of the evidence challenge for correction of errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997).

***III. Sufficiency of the Evidence.***

We uphold a verdict if substantial evidence supports it. *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005). A jury's finding of guilt is binding upon us unless there is not substantial evidence in the record to support the finding. *State v. Sutton*, 636 N.W.2d 107, 110 (Iowa 2001). Substantial evidence is evidence that could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. *State v. Robinson*, 288 N.W.2d 337, 339 (Iowa 1980). "'Evidence in not insubstantial merely because we may draw different conclusions from it; the ultimate question is whether it supports the finding actually made, not whether the evidence would support a different finding.'" *Chrysler Fin. Co. v. Bergstrom*, 703 N.W.2d 415, 418 (Iowa 2005) (quoting *Fischer v. City of Sioux City*, 695 N.W.2d 31, 33-34 (Iowa 2005)).

We view the evidence in the light most favorable to the State, but consider all the evidence, not just the evidence supporting the verdict. *Thomas*, 561 N.W.2d at 39. "Direct and circumstantial evidence is equally probative." *State v. Shortridge*, 589 N.W.2d 76, 80 (Iowa Ct. App. 1998). The evidence must raise a fair inference of guilt as to each essential element of the crime and must do more than raise suspicion, speculation, or conjecture. *State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2000). "[W]hen two reasonable inferences can be drawn from a piece of evidence, we believe such evidence only gives rise to a suspicion, and,

without additional evidence, is insufficient to support guilt." *State v. Truesdell*, 679 N.W.2d 611, 618-19 (Iowa 2004).

Iowa Code section 713.2 defines attempted burglary as follows:

> Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license, or privilege to do so, attempts to enter an occupied structure, the occupied structure not being open to the public . . . or any person having such intent who attempts to break an occupied structure, commits attempted burglary.

Iowa Code section 713.6 classifies attempted burglary in the second degree as burglary attempted without the use of a dangerous weapon or explosive while one or more persons are present within the occupied structure and no bodily injury is caused to any person. "Attempted burglary is distinguished from the completed crime by defendant's failure to effect an entry." *State v. Erving*, 346 N.W.2d 833, 836 (Iowa 1984).

Showens's challenge to the sufficiency of the evidence supporting his conviction is limited to the intent to commit a theft or assault element of attempted burglary. We therefore limit our consideration to the evidence relevant to Showens's intent.

"[T]he element of intent in burglary is seldom susceptible to proof by direct evidence." *State v. Finnel*, 515 N.W.2d 41, 42 (Iowa 1994) (quoting *State v. Olsen*, 373 N.W.2d 135, 136 (Iowa 1985)). "It is not required that intent be proved by direct evidence; intent is seldom so proved." *State v. Salkil*, 441 N.W.2d 386, 388 (Iowa 1989). "Usually proof of intent will depend upon circumstantial evidence and inferences drawn from such evidence." *Finnel*, 515 N.W.2d at 42. "We also have held failure to effect a completed breaking and

entry will not negate the jury's ability to find an unlawful intent." *Erving*, 346 N.W.2d at 836. "The requirement of proof beyond a reasonable doubt is satisfied if it is more likely than not that the inference of intent is true." *Finnel*, 515 N.W.2d at 42. Under an earlier version of the burglary statute, our supreme court held the unexplained breaking and entering of a dwelling house in the nighttime is sufficient to support the jury's finding that the breaking and entering was done to commit larceny. *State v. Woodruff*, 208 Iowa 236, 239, 225 N.W. 254, 257 (1929). The supreme court has also said, "It is almost uniformly held that where one breaks and enters the property of another in the nighttime an inference can be drawn that he did so with the intent to commit a larceny." *State v. Allnut*, 261 Iowa 897, 905, 156 N.W.2d 266, 271 (1968) *reversed on other grounds by State v. Gorham*, 206 N.W.2d 908, 910 (Iowa 1973).

We, like the trial court, find the record contains substantial evidence from which the jury could infer Showens's intent to commit a theft. In addition to the circumstantial evidence we have already mentioned, Showens's intent to commit a theft is also supported by the permissible inference drawn from his attempted entry into Bierman's apartment. *Id.* Showens's implausible statements concerning his presence at the apartment building and intentions for looking in Bierman's window are also evidence from which the jury could infer his intent to commit a theft. *See State v. Schrier*, 300 N.W.2d 305, 309 (Iowa 1981) (consciousness of guilt may be inferred from palpable falsehood or suppression of true facts). We affirm on this issue.

***IV. Prosecutorial Misconduct.***

Showens's prosecutorial misconduct claim is based on statements the prosecutor made in closing argument. Because the record fails to disclose any objections to the prosecutor's closing argument, Showens has failed to preserve error on this issue. *See State v. McCright*, 569 N.W.2d 605, 608 (Iowa 1997).

**AFFIRMED.**