

**IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA**

**THE STATE OF NEBRASKA,**  
Plaintiff,

Case No. CR99-31

vs.

**VERDICT**

**PATRICIA SHIELDS,**  
Defendant.

**DATE OF TRIAL:** February 24, 2000.

**DATE OF DECISION:** March 2, 2000.

**APPEARANCES:**

For plaintiff: Thomas P. Herzog, Holt County Attorney.

For defendant: Rodney W. Smith, Holt County Public Defender, with defendant.

**SUBJECT OF ORDER:** Verdict of court without a jury (a jury having been expressly waived by defendant) following trial upon stipulated evidence.

**PROCEEDINGS:** Proceedings were held as follows:

Counsel for plaintiff and defendant respectively presented opening statements. Evidence was adduced for plaintiff by stipulated exhibits and supplemental verbal stipulation entered into on the record in open court. The plaintiff rested. The defendant rested without evidence. Closing arguments were waived.

**FINDINGS:** The court finds and concludes that:

1. The sole legal issue preserved by the trial is whether the defendant's conduct constitutes the charged crime of burglary under NEB. REV. STAT. § 28-507 (Reissue 1995).

2. Exhibit 2, a written stipulation between the parties, states:

It is agreed and stipulated that on or about November 5, 1997, the Defendant was employed at Gokie's Fast Mart, a convenience store and gas station located in O'Neill, Holt County, Nebraska. That on said date the Defendant was legally present in the public or common area of the premises pursuant to her employment. That there was an individual room in the Gokie's Fast Mart building separate from the public or common area of the premises which room was used as an office and the door to which room was locked on

said date. That only Jerry Gokie and secretary Deb Young were authorized to have keys to the office door. That the Defendant was not authorized to have a key, nor was she authorized to enter the office when the door was locked. That on November 5, 1997, the Defendant did nonetheless enter the locked office room in the Gokie's Fast Mart store, apparently with the use of a key that she was not authorized to have. That she did so without the knowledge or permission of proprietor Jerry Gokie or secretary Deb Young or anyone else. That the Defendant did steal a \$50.00 bill from said office on said date after entering by the locked office door which \$50.00 bill did not belong to her.

Exhibit 2. Although the record contains additional stipulated evidence, the quoted language sufficiently illustrates the legal issue.

3. All crimes in Nebraska are statutory in nature. *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999); *State v. Parks*, 253 Neb. 939, 573 N.W.2d 453 (1998). Consequently, no act is criminal unless the Legislature has in express terms declared it to be so. *State v. Schneckloth, Koger, and Heathman*, 210 Neb. 144, 313 N.W.2d 438 (1981)

4. NEB. REV. STAT. § 28-507 (Reissue 1995) states: "A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value."

5. The opening of a closed door is a "breaking" within the definition of burglary. *State v. Tyrrell*, 234 Neb. 901, 453 N.W.2d 104 (1990). Clearly, the defendant opened an inner door on the premises. The evidence clearly shows that such inner door was closed and locked. The defendant was lawfully within the outer walls of the building, but not within the walls of the separately locked room. The critical question is whether this constitutes "break[ing] and enter[ing] any real estate or any improvements erected thereon" within the meaning of the statute.

6. Penal statutes are strictly construed. *State v. White, supra*; *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). However, statutory language is to be given its plain and ordinary meaning. *State v. White, supra*.

7. This court finds no reported Nebraska decision applying the current statute in the instance of an inner door or upon limited consent. However, in *State v. Pappen*, 193 Neb. 80, 225 N.W.2d 416 (1975), the Nebraska Supreme Court upheld a burglary conviction under the former statute. NEB. REV. STAT. § 28-532 (Reissue 1975). The former section differs from the current statute only in that the former

section expressly listed various types of structures. The current section more generally describes the property which may be broken into and entered. In *Pappen*, the Supreme Court cited the rule that unlimited consent to enter a building is generally a defense to burglary, but a consent limited as to place, time, or purpose is not a defense if the entry occurred outside the limitation. *State v. Pappen, supra*, at 82, 225 N.W.2d at \_\_\_\_.

8. Generally, the offense of burglary is committed if a servant, guest, or other person, being lawfully in a building, enters a room which she has no right to enter with felonious intent, by breaking or opening an inner door. 12A C.J.S. *Burglary* § 16 (1980). A breaking of an inner door or obstruction is a breaking and entering of the house, and this rule generally applies under statutes punishing the breaking and entering of dwelling houses and other buildings, as well as at common law. *Id.* The decisions are largely in agreement that breaking and entering an inner door of building can constitute burglary. Annot., 43 A.L.R.3d 1147 (1972). Some decisions adopt a narrower rule that a servant or employee can be guilty of burglary by breaking and entering any inner room of a dwelling house, office, or hotel, as the case may be. *Id.* See also Annot., 58 A.L.R.4th 335 (1987) (maintainability of burglary charge, where entry into building is made with consent).

9. The court finds the decision of the Missouri Supreme Court, in *State v. Burke*, 462 S.W.2d 701 (Mo. 1971), particularly persuasive. The Missouri statute, similar to the Nebraska version, prohibited “breaking and entering any building.” The Missouri court analyzed the common law and decisions from other jurisdictions, concluding that the defendant was properly convicted. The Missouri Supreme Court also rejected an argument concerning legislative intent based upon contrasting language specifically referring to inner doors in another statute and the absence of such language in the statute under consideration. In so doing, the court observed that the particular statute was stated in general terms and should be construed as at common law and in the various other states. This court concludes that the Nebraska Legislature used general terms and that the burglary statute should be construed accordingly. Thus, the absence of specific language such as that used in § 28-520 (applying trespass offense to “any building or occupied structure, or any separately secured or occupied portion thereof”) does not dictate any different conclusion.

10. The court finds that the state proved each and every element of the charged crime beyond a reasonable doubt, and that the defendant should be adjudged guilty as charged.

11. Although the court had stated a date certain for the defendant to appear for pronouncement of the verdict, the court discerns no reason why the verdict should not be rendered in writing and the matter advanced to sentencing without further delay.

12. Of course, in a criminal case it is the sentence which constitutes the judgment. *State v. Reeves*, 258 Neb. 511, \_\_\_ N.W.2d \_\_\_ (2000). Consequently, this order is interlocutory in character and does not constitute a final judgment.

**ORDER:** IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The verdict of the court adjudging the defendant as guilty of Burglary, a Class III felony, as charged in the Information filed in this case, is hereby entered.

2. Sentencing is set for **May 4, 2000, at 9:00 a.m.** The defendant is ordered to appear for sentencing.

3. A presentence investigation by the probation officer is ordered and the clerk is directed to notify the probation officer.

Signed in chambers at O'Neill, Nebraska, on March 2, 2000.

DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

Mail a copy of this order to all counsel of record and to any pro se parties.

Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

**Notify probation officer regarding presentence report ordered.**

Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

Mail postcard/notice required by § 25-1301.01 within 3 days.

Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

Note the decision on the trial docket as: [date of filing] Signed "Verdict" entered.

Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

Mailed to:

BY THE COURT:

\_\_\_\_\_  
William B. Cassel  
District Judge