FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed August 27, 1986 320
vs.	)	
KEITH JAMERSON BRYANT,	)	6-183 / 85-772
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Clinton County (No. K-5930) - C. H. Pelton, Judge.

Defendant appeals from his conviction for theft in the second degree. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Pamela Greenman Dahl, Assistant Attorney General; and Gary J. Rolfes, Assistant County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Snell and Hayden, JJ.

Defendant was charged with theft in the second degree after stolen property was found during a search of his home. At trial defendant and his wife testified that the property had been left with them for storage by an acquaintance. Over objection the jury was given an instruction stating, in relevant part, as follows: "Possession of recently stolen property by the Defendant justifies an inference that he possessed it with guilty knowledge." The court overruled defendant's motion for new trial. We affirm.

The underlying facts of this case are as follows: On July 25, 1984, a burglary occurred at the home of David and Becky Pratt in Clinton. Property stolen in the break-in included Sony video recorder equipment. On October 15, 1984, Clinton police officers executed a search warrant at defendant's apartment. When the officers explained to the defendant what they were looking for, he pointed out the video recorder equipment on top of his television set. The Pratts identified most of the items seized from defendant as the items seized from their residence.

Defendant and his wife testified that the video equipment was brought to their home by one Andre Jackson in August 1984. Jackson asked defendant to store a box of his belongings while he (Jackson) looked for a permanent residence. Bryant agreed and placed the box in a closet in the apartment. Approximately one week later, Jackson stopped by, checked his belongings, and while there, gave Bryant permission to use the video recorder. Defendant did not dispute that video equipment had been stolen from the Pratt residence, nor did he deny that he had temporarily possessed and used this equipment. The sole contested issue was whether defendant knew the property was stolen when he exercised control over it.

The trial court submitted the following instruction on knowledge:

> Instruction No. 14. Possession of recently stolen property by the Defendant justifies an inference that he possessed it with guilty knowledge. . . . (emphasis added)

Defendant unsuccessfully objected to this instruction on the ground that "it is improper shifting of the burden [of proof]."

Defendant again challenged the instruction in his motion for new trial. The trial court overruled the motion.

Defendant argues that the words "justifies an inference" improperly shifted the burden of proof by indicating that the jurors should infer guilty knowledge from proof of defendant's possession of stolen property and therefore establishes an impermissible mandatory presumption. The distinction between a permissive inference and an impermissible mandatory presumption was explained by the United States Supreme Court as follows:

> The most common evidentiary device is the entirely permissible inference or presumption which allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and that places no burden of any kind on the defendant. . . . Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference.
>
> A mandatory presumption is a far more troublesome evidentiary device. For it may affect not only the strength of the "no reasonable doubt" burden but also the placement of that burden; it tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts.

Ulster County Court v. Allen, 442 U.S. 140, 157, 99 S. Ct. 2213, 2224-25, 60 L. Ed. 2d 777, 792 (1970); see State v. Winders, 359 N.W.2d 417, 419 (Iowa 1984).

The language at issue in Instruction No. 14 is not found in the Iowa Uniform Jury Instructions. The stock instruction for guilty knowledge in cases such as this is as follows:

> If you find the State has proved by evidence beyond a reasonable doubt each of the following facts, then you may, but are not required to, infer that the defendant knew or believed that the property had been stolen: .... (emphasis added)

II Iowa Uniform Jury Instructions (criminal) No. 1430. The inference in this uniform instruction is permissive. See Sandstrom v. Montana, 442 U.S. 510, 515-17, 99 S. Ct. 2450, 2454-55, 61 L. Ed. 2d 39, 45-46 (1979).

A permissive presumption or inference is one that allows, but does not require, the jury to infer an elemental fact from proof of a basic one. . . . because the permissive presumption [inference] leaves the jury free to reject the inference, it does not affect the burden of proof, unless there is no rational way the jury can draw the inference. A mandatory presumption, on the other hand, tells the jury that it must find an elemental fact from proof of a basic one. In a criminal trial, a mandatory presumption violates the due process clause of the fifth and fourteenth amendments of the United States Constitution because it undermines the fact finder's responsibility to find the ultimate facts beyond a reasonable doubt. State v. Winders, 359 N.W.2d 417, 419 (Iowa 1984).

We find the language in this case is comparable to the language approved in State v. Rinehart, 283 N.W.2d 319 (Iowa 1979), cert. denied, 444 U.S. 1088, 100 S. Ct. 1049, 62 L. Ed. 2d 775. In that case the jury was instructed that it had "a right to infer" that the defendant intended the natural and probable consequences which ordinarily follow his acts. Rinehart, 283 N.W.2d at 321.

The Iowa Supreme Court in Rinehart observed two factors: (1) the instruction in question did not state or imply that elemental facts inferred from those

proven would stand as established absent rebuttal by defendant, and (2) the instruction used the term "infer" as opposed to "presume."

Here, as well as in Rinehart, the instruction does not include any language which states or implies defendant has a burden to rebut the inference. Compare: State v. Winders, 359 N.W.2d 417-18 (Iowa 1985). Also, the term "inference" rather than "presumption" was used. There is a difference in the common definitions of "infer" and "presume." To "presume" is to "suppose without proof;" to "infer" means "to derive by reasoning or implication [or] conclude from facts or premises." Rinehart, 283 N.W.2d at 322 (citations omitted).

Defendant points out instruction no. 14 did not include qualifying language such a "may but are not required to infer" as contained in Uniform Jury Instruction No. 1430. Also, the questioned instructions in Rinehart did not contain such qualifying language. If the instruction clearly apprises the jury of the law, the trial court is not bound to instruct in any particular language. State v. Luter, 346 N.W.2d 802 (Iowa 1984); State v. Tensley, 249 N.W.2d 659 (Iowa 1977).

If an instruction creates a permissive inference; it will be upheld so long as there is "a rational connection between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is more likely than not to flow from the former." Ulster County Court v. Allen, 442 U.S. at 151, 99 S. Ct. at 2229, 60 L. Ed. 2d at 798. Iowa has for a long time employed the inference that unexplained possession of recently-stolen property permits the jury to infer the property was received with guilty knowledge, i.e., knowing that it was stolen. See State v. Post, 286 N.W.2d 195, 203 (Iowa 1980).

We hold instruction no. 14 as given by the trial court created a permissive inference and it did not shift the burden of proof to defendant. Further, there

exists a rational connection between the unexplained possession of recently-stolen property and an inference of guilty knowledge.

AFFIRMED.

Snell, J., concurs; Oxberger, C.J., dissents.

OXBERGER, C.J., (dissenting).

"Justifiable" is defined in Black's Law Dictionary as "[r]ightful; defensible; warranted or sanctioned by law; . . . ." Black's Law Dictionary 778 (rev. 5th ed. 1979). Webster's New Collegiate Dictionary defines "justify" as "[t]o be what constitutes sufficient grounds (as for doing, using, saying, or preferring something.)" Webster's New Collegiate Dictionary 623 (1981). Webster's Third New International Dictionary defines "justify" as "to prove or show to be just, desirable, warranted, or useful. . . " and "to confirm, maintain, or acknowledge as true, lawful, or legitimate. . . to prove or show to be valid, sound, or conforming to fact or reason: furnish grounds or evidence for." Webster's Third New International Dictionary, 1221 (1961). By contrast, the word "may" is defined as "have permission to; have liberty to. . . ." Webster's New Collegiate Dictionary 704 (1981).

I think that the disparity between the definitions of "justify" and "may" indicates that the words are not interchangeable, particularly in the context of a presumption in a criminal case. These definitions reveal that a reasonable juror is likely to interpret the instruction given in the instant case as a mandatory presumption, thereby denying the defendant's due process rights within the meaning of Sandstrom v. Montana, 442 U.S. 510, 514-15 (1979).