IN THE COURT OF APPEALS OF IOWA

No. 7-621 / 97-0093
Filed January 28, 1998

FILED
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CLERK SUPREME COURT

IN THE INTEREST OF R.F., Minor Child,

R.F., Minor Child,
Appellant.

Appeal from the Iowa District Court for Winneshiek County, Alan D. Allbee, Associate Juvenile Judge.

Juvenile appeals from adjudication and dispositional orders finding he committed three delinquent acts as defined by Iowa Code section 232.2(12)(a) (1997).

AFFIRMED.

David L. Strand of Larson, Nichols & Strand, Decorah, for appellant.

Thomas J. Miller, Attorney General, and Kathrine S. Miller-Todd, Assistant Attorney General, for appellee.

Heard by Cady, C.J., and Sackett and Streit, JJ.

STREIT, J.

A juvenile appeals the denial of his motion for judgment of acquittal. He argues the State had insufficient evidence to prove he committed the delinquent acts of theft in the second degree and possession of alcohol as a minor. He also contends the statement he gave to police the morning of his arrest was involuntary and inadmissable. We affirm the trial court on all issues.

I. Background & Facts.

In the early morning hours of August 1996, Waukon police officers spotted two motorcycles parked outside of the Waukon KwikStar. While the officers checked the license plates to see if the motorcycles were stolen, fifteen-year-old Randy, his sister, and two other juveniles exited the KwikStar and fled on foot. Randy and his sister were caught by the police. Randy initially refused to speak to police, but gave a statement after urging by his mother. Randy admitted he and his cohorts had been out looking for motorcycles to steal and, after they were stolen, he rode one as a passenger. The next month, Randy was arrested for riding in a stolen car with thirty cans of beer in the trunk.

Randy was charged with three counts of second-degree theft, underage possession of alcohol, and possession of burglar tools. At trial, Randy objected to the admission of his August statement to police. The objection was overruled. After the State rested, Randy motioned for judgment of acquittal alleging there was insufficient evidence to prove the crimes charged. The court found the State proved beyond a

reasonable doubt Randy committed the second-degree thefts and underage possession of alcohol. Randy was placed in the custody of Juvenile Court Services for placement in foster group care or a comprehensive residential treatment program.

II. Standard of Review.

Our review is de novo. We review questions of law and fact. Iowa Code § 232.133(1); *In re D.I.C.*, 464 N.W,2d 881, 882 (Iowa 1991). Weight is given to the fact-findings of the trial court, especially when considering credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7); *In re J.D.S.*, 436 N.W.2d at 343. Challenges to the sufficiency of the evidence are reviewed for correction of errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). Considering the evidence in the light most favorable to the State, we look to see whether substantial evidence supports the verdict. *State v. Coffman*, 562 N.W.2d 766, 768 (Iowa App. 1997); *Id.* We consider all the evidence, not just the evidence supporting the verdict. *State v. Blair*, 347 N.W.2d 416, 419 (Iowa 1984). We will affirm the verdict provided the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion or conjecture." *Coffman*, 562 N.W.2d at 768.

III. Theft of Motorcycle & Vehicle.

Randy was charged with the delinquent acts of theft in the second degree of the stolen motorcycle and the stolen automobile. A person commits theft under the Iowa Code when he:

> Exercise[s] control over stolen property, knowing such property to have been stolen or having reasonable cause to believe that such property has been stolen, unless the person's purpose is to promptly restore it to the owner or to deliver it to an appropriate officer . . . .

Iowa Code § 714.1(4)(1997).

Theft in the second degree may be proven by showing the value of the item stolen is between $1000 and $10,000 or by showing the item taken is a motor vehicle. *Id.* However, a "motorized bicycle" is not considered a motor vehicle for purposes of the statute.

*A. **Motorcycle Theft.*** Randy argues he can not be convicted of theft of a "motor vehicle" because the State did not establish the motorcycle stolen fit within the statutory definition of a motor vehicle. He argues the State was required to establish the vehicle was a motorcycle rather than a motorized bicycle under the statute.[1] He also contends he can not be convicted of theft of the motorcycle because he was not present when the motorcycle was stolen and was not in control of the motorcycle.

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[1] Iowa Code Section 321.1(40)(a) defines motorcycle as "every motor vehicle having a saddle or seat for the use of the rider and designed to travel on not more than three wheels in contact with the ground . . ."

Iowa Code Section 321.1(40)(b) defines motorized bicycle as "[A] motor vehicle having a saddle or a seat for the use of a rider and designed to travel on not more than three wheels in contact with the ground, with an engine having a displacement no greater than fifty cubic centimeters and not capable of operating at a speed in excess of twenty-five miles per hour on level ground unassisted by human power."

Both contentions have no merit. There is sufficient evidence the stolen vehicles in question were motorcycles rather than motorized bicycles. Randy himself refers to the stolen vehicles as "motorcycles" rather than mopeds or motorized bicycles. A police officer testified the stolen vehicles were mid-sized motorcycles. A motorized bicycle is a vehicle not intended to go over twenty-five miles per hour. The picture of the Honda motorcycle, entered as a State exhibit, is clearly is a vehicle that could be operated in excess of twenty-five miles per hour without human power.

The State had the burden to prove Randy was in possession of the motorcycle. The word "possession" includes actual as well as constructive possession, and also sole as well as joint possession. *State v. Reeves*, 209 N.W.2d 18 (Iowa 1973). A person who has direct physical control of something on or around his person is in actual possession of it. *State v. Padavich*, 536 N.W.2d 743, 751 (Iowa 1995). A person not in actual possession, but who has knowledge of the presence of something and has the authority or right to maintain control of it either alone or together with someone else, has constructive possession. *Id.* If one person alone has possession, possession is sole. *Id.* If two or more persons share possession, possession is joint. *Id.*

Randy had joint and constructive possession of the stolen vehicles sufficient to support his two convictions. He admitted that in the past he had driven motorcycles after stealing them. Just because he was not driving the stolen vehicle does not mean he was not just as much a part of the crime. He went to Decorah for

the purpose of identifying motorcycles to steal. He knew his group intended to steal the motorcycles and was with the group after they had stolen them. He rode on one of the stolen motorcycles after knowing it was stolen. These facts amount to joint and constructive possession of the motorcycle sufficient to find Randy guilty of theft by possession.

B. Theft of the Automobile. Randy contends he was only a passenger in the stolen auto and did not exercise control over it. Like the motorcycle, Randy had joint and constructive possession of the stolen automobile. He left school with two other boys and accompanied them to a greenhouse where one companion stole the automobile. He walked down the road from the greenhouse and was picked up by the stolen car. He knew the car was stolen. The group drove around in the stolen automobile for nearly four hours. Randy had sufficient control over the stolen automobile to be guilty of theft by possession.

Even if he were not guilty as a principal of theft by possession, he was guilty due to his joint criminal conduct. When two or more persons act together and knowingly commit a crime, each is responsible for the other's acts during the commission of the crime. Iowa Code § 703.2. Randy knew about the crimes. He participated in the crimes. Just because his role was not to drive the vehicle does not mean he did not commit the thefts.

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IV. Underage Possession of Alcohol.

A person under the age of eighteen shall not have alcohol in his possession or control either individually or jointly. Iowa Code § 123.47 (1997). Randy contends the State had no evidence he exercised control over the alcohol in the trunk of the stolen vehicle. A right to control an item may be imputed when contra band is found in a place immediately accessible to the accused. *Reeves*, 209 N.W.2d at 22. The beer was found in the back of the stolen car in which Randy was riding. He was in the car for four or five hours. It is a fair inference that within that time he had access to the beer. Even if Randy were not individually in control of the alcohol, he was jointly in control of it. Iowa Code § 123.47; *See State v. Brandt*, 444 N.W.2d 97 (Iowa App. 1989)(when two or more persons share possession, possession is joint). The trial court correctly found Randy was a minor in possession of alcohol.

V. Voluntariness of Statement to Police.

Randy argues his statement to police in August, after his arrest, was involuntary and inadmissable. He claims he was deprived of sleep and food for several hours, promised leniency, only allowed to confer with his mother in the presence of officers, and was suffering from mental weakness.

The test of whether a juvenile waived his right to remain silent and made a voluntary statement is a totality of the circumstances analysis. *See In re Thompson*,

241 N.W.2d 2, 6 (Iowa 1976). Factors to consider in the analysis are set out in Iowa Code Section 232.47(6).[2]

Randy argues he was promised leniency for talking to police, but offered no evidence of a promise of leniency. Officer Young stated no promises of leniency were made to encourage Randy to give a statement. Randy complains he was deprived of food and sleep. This contention is also unsupported. He was arrested at 2:30 a.m. His mother was called at 3:00 a.m. and did not arrive at the station until about 4:00 a.m. Randy's sister was interviewed at 4:30 a.m. and Randy at about 6:00 a.m. There was no reason to give Randy food during these hours. Randy is the one who chose to commit a crime in the early morning hours. He is the one who started this series of events in the predawn hours. Randy seems to be complaining the arresting officers should have responded with nurturing thoughtfulness: "Oh my, this little fellow should be in bed. Now, you get right to bed young man and we'll talk about this in the morning when you're fresh and have had a good breakfast." The police did not unnecessarily delay the arrest and investigatory process. They behaved reasonably and did nothing that would have made Randy's statement involuntary.

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[2] Those factors are: (a) opportunity for the child to consult with a parent, guardian, custodian, lawyer or other adult; (b) the age of the child; (c) the child's level of education; (d) the child's level of intelligence; (e) whether they child was advised of the child's constitutional rights; (f) length of time the child was held in shelter or detention before making the statement in question; (g) the nature of the questioning which elicited the statement; (h) whether physical punishment, such as deprivation of food or sleep, was used upon the child during the shelter care, detention or questioning.

Review of the adjudicatory hearing shows Randy's mother did more to convince Randy to make a statement than the officer. Randy originally said he did not want to talk to the officers, but his mother convinced him to talk. Ms. Bond, Randy's mother, testified as follows at trial:

> Q: Before you signed this, Officer Courtney had remarked that he asked you--Do you parents understand the rights I have explained to your child, is that correct?
> A: Yes.
> Q: And did he also ask you, having these rights in your mind, do you want your child to talk to me at all, and you indicated yes.
> A: Yes, I did.
> Q: So you indicated both by your signature and verbally that you wanted Randy to talk to the police that morning, is that correct?
> A: Yes.
> Q: And you told him he should, right?
> A: Right. And I told Randy he should tell the truth.
> . . .
> Q: Did anybody force you to tell Randy to give a statement?
> A: No, nobody forced me.

After a totality-of-the-circumstances analysis, we find Randy voluntarily waived his right to remain silent. His statement was voluntary. The trial court was correct to admit the statement.

AFFIRMED.