

IN THE COURT OF APPEALS OF IOWA

FILED

OCT 25 1983

CLERK SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed October 25, 1983

vs.

)

JAMES HOWARD CUMMINS,

)

3-221

69364

Defendant-Appellant.

)

Appeal from Scott District Court - David J. Sohr, Judge.

Defendant appeals the judgment and sentence upon his conviction of theft in the third degree. **AFFIRMED.**

Charles Harrington, Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Richard Cleland, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

PER CURIAM

Defendant appeals the judgment and sentence upon his conviction of theft in the third degree. Defendant was convicted of theft in the third degree pursuant to Iowa Code sections 714.1(1) and 714.2(3), as amended by 1981 Iowa Acts chapter 204, section 9, after trial by jury. Defendant was found guilty of theft in the fifth degree, and of having been twice before convicted of theft. On the basis of that conviction, defendant was sentenced to a two-year term of imprisonment.

I. Defendant initially claimed that the recidivist option of Iowa Code section 714.2(3) violates the double jeopardy clause of the fifth amendment to the United States Constitution. Iowa Code section 714.2(3) provides:

3. The theft of property exceeding one hundred dollars but not exceeding five hundred dollars in value, or the theft of any property not exceeding one hundred dollars in value by one who has before been twice convicted of theft, is theft in the third degree. Theft in the third degree is an aggravated misdemeanor.

As stated in State v. Tobin, 333 N.W.2d 842, 845 (Iowa 1983), "[t]he prior convictions are a predicate for enhanced punishment rather than elements of the current theft charge. . . . It is well established that the use of prior convictions to enhance punishment does not violate the constitutional stricture against double jeopardy." (citing cases).

Defendant agrees that Tobin is dispositive of this issue in the case at bar. Accordingly, the enhancement of punishment provided by section 714.2(3) is not in violation of defendant's constitutional rights with respect to double jeopardy.

II. Defendant complains that the trial court erred in overruling his motion for judgment of acquittal, made at the close of the State's case, and renewed at the close of all the evidence. Defendant claims the State failed to present sufficient evidence to generate a jury question on the issue of defendant's having taken possession of the property of another with intent to deprive the owner thereof. It is defendant's contention that since there was evidence he had been drinking all day, it was incumbent upon the State to prove beyond a reasonable

doubt that he was not so intoxicated as to be unable to form the required specific intent. See State v. Holmes, 276 N.W.2d 823, 826 (Iowa 1979). He claims that the State failed to offer sufficient evidence on this issue, and that he is entitled to a judgment of acquittal. We disagree.

In reviewing the defendant's claim, this court views the evidence in a light most favorable to the State. All legitimate inferences that may reasonably be deducted therefrom will be accepted. State v. Freie, 335 N.W.2d 169, 171 (Iowa 1983); State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). All the evidence must be considered when determining evidentiary sufficiency. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). Furthermore, the verdict will be upheld if supported by "substantial" evidence, i.e., evidence which would convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. State v. Epps, 322 N.W.2d 288, 289 (Iowa 1982); State v. Robinson, 288 N.W.2d at 339.

The State presented considerable evidence that the defendant was not intoxicated. Defendant's evidence demonstrates an episode of drinking that shows a significant consumption of alcohol. However, defendant's testimony, at best, disputed the State's evidence, and presented a question for determination by the fact finder. The jury found defendant had the ability to form the requisite intent, and found him guilty. The jury's finding was supported by substantial evidence.

AFFIRMED.