IN THE COURT OF APPEALS OF IOWA

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5-594
85-253

STATE OF IOWA,

Plaintiff-Appellee,

vs.

JAMES LEE HUNT,

Defendant-Appellant.

Appeal from the Iowa District Court for Marshall County - B. C. Sullivan, Judge.

Defendant appeals from his conviction of second-degree burglary asserting there was insufficient evidence to support it. **AFFIRMED.**

Charles Harrington, Appellate Defender, and Michael J. Laughlin, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Roxann M. Ryan, Assistant Attorney General, and Phillip L. Krejci, County Attorney, for plaintiff-appellee.

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

Defendant Hunt appeals his conviction of second-degree burglary on the basis of insufficient evidence.

In determining sufficiency of the evidence, we view the evidence in the light most favorable to the state. State v. Doss, 355 N.W.2d 874, 877 (Iowa 1984). All inferences that are fairly and reasonably deducted from the evidence are accepted, and all the evidence, not just that supporting the verdict, is considered. State v. Blair, 347 N.W.2d 416, 418-19 (Iowa 1984). The jury verdict will be upheld if supported by substantial evidence, which is evidence that could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. Id. at 419.

Defendant claims that the state failed to meet its burden of proof on any of the elements of the crime of burglary and failed to present sufficient evidence that defendant aided or abetted the two convicted co-defendants. Defendant contends he was so intoxicated that he was sleeping, or could not comprehend what was happening, during the time the co-defendants were committing the crime. Defendant cites U.S. v. Crow Dog, 399 F.Supp. 228 (N.D. Iowa 1975) and U.S. v. Holder, 566 F.2d 617 (8th Cir. 1977), for the principle that mere presence, even when coupled with negative acquiescence, is not sufficient to constitute aiding and abetting.

Burglary is committed by a person who, with the intent to commit a felony, breaks into an occupied structure or any other place where anything of value is kept. Iowa Code § 713.1 (1983). All persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense or knowingly aid and abet its commission, shall be charged, tried and punished as principals. Iowa Code § 703.1 (1983). Aiding and abetting is established if substantial evidence shows that the accused assented to or lent countenance

and approval to the criminal act either by actively participating in it or by in some manner encouraging it prior to or at the time of its commission. State v. Doss, 355 N.W.2d at 877-78. Guilt may be established by circumstantial evidence. Id. at 878. Knowledge is essential, but neither knowledge nor presence at the scene of the crime is sufficient to prove aiding and abetting. Id. The underlying precept of aiding and abetting is a requirement that the accessory in some way associate himself with the venture, that he participate in it as something he wishes to bring about, and that he seeks by his action to make it succeed. State v. Phams, 342 N.W.2d 792, 796 (Iowa 1983).

Under the record before us, there is sufficient evidence of Hunt's assent and approval by encouraging the criminal act prior to and at the time of its commission. Hunt and the two co-defendants were drinking and driving together the entire period when the two co-defendants admitted burglarizing the county storage facility. Co-defendant Hudson testified:

> Q. Why did you go to the County garage over on East Boone? A. Mainly to get some gasoline for the Challenger. Supposedly nobody had any money. I know for a fact I didn't have any, but we needed some gasoline so I just figured it would be the easiest way to pick it up. [emphasis added].

Hudson further testified he and defendant Hunt both drove the Challenger that evening.

> A. We came back into the town with a full tank of gas and we rode around for a while. I decided I wanted to go back and, you know, get some more gas because we was getting empty again and nobody made any objections. As far as Mr. Kinzenbaw, he was the one driving the car at the time so he said no problem.
> Q. Where was Mr. Hunt? A. He was in the rear seat, back seat.

Q. So you returned to the County garage a second time? A. Yes. It was probably an hour later, I'd say.
Q. And what did you do there again? A. I went ahead and stole another pickup and I decided to take it driving around, too. [emphasis added].

After the first county pickup had been stolen and abandoned by Hudson, Hudson stated he got back into the Challenger:

Q. You don't recall any conversation with Mr. Hunt during that time? A. No, except for he said go ahead and go and that was about it.
Q. Who indicated go ahead, go? Was that Mr. Kinzenbaw or Mr. Hunt? A. Mr. Hunt.

As to the issue of defendant Hunt's participation in the crime and his intoxicated state, Hudson stated the following:

Q. Do you recall what the other two people in the car would have had? A. No, I can't. I believe Mr. Kinzenbaw said he had been drinking before he came over there and Mr. Hunt and, you know, he hadn't been as far as I could tell.
Q. Was he while you were with him? A. Oh, yeah.
Q. How would you describe his condition in the back seat of the car? A. Half the time out of it, you know, as far as passed out. He threw up a couple times and come up then was awake for half four, 20 minutes.
Q. When did he first appear in this condition, passed out and throwing up? A. Um, sometime before that first truck, I believe, because he had been riding in the front seat and also earlier that evening we were stopped for squealing tires in the car, and it was right after that when we went out to the park the first time and we got back in. Then he was in the back seat.
* *
Q. Was Mr. Hunt out of the vehicle other than at the park at any time during this episode involving the Marshall County barn? A. He got out on the first one when we was

siphoning the gas but that was just, you know, to do what he had to do. Then he got back in the car then.

Q. I guess — what do you mean, he was doing — A. Urinating.

Although there was some testimony that defendant Hunt was passed out and did not know what events were taking place, it is for the jury to decide what effect, if any, defendant's intoxication had on his ability to form the intent necessary to commit a crime. State v. LeGear, 346 N.W.2d 21, 24 (Iowa 1984).The officer who stopped them for squealing their tires at approximately midnight testified that Kinzenbaw was driving, Hudson was in the back seat, and a third person was sitting in the front passenger seat. From this evidence the jury could have inferred that Hunt was not passed out the entire time.

As to Hudson and Kinzenbaw both testifying that defendant Hunt did not participate in the burglary, the jury determines the credibility of witnesses as the trier of fact. State v. Blair, 347 N.W.2d 416, 420 (Iowa 1984). Viewing the evidence as a whole and in a light most favorable to the state, we find a reasonable juror could have concluded that Hunt had sufficient knowledge of the burglary to justify convicting him on the theory of aiding and abetting. Defendant Hunt's conviction of second-degree burglary is affirmed.

AFFIRMED.