IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed January 28, 1977
vs.	)	
GARY DUANE KASTER,	)	39 59416
Appellant.	)	

Appeal from Cerro Gordo District Court - B. C. Sullivan, Judge.

Appeal from conviction of breaking and entering. - Reversed.

Beck, Pappajohn and Shriver, of Mason City, for appellant.

Richard C. Turner, Attorney General, and Clayton L. Wornson, County Attorney, for appellee.

Submitted to Allbee, C.J., Donielson, Snell, Oxberger and Carter, JJ.

FILED
JAN 28 1977
CLERK SUPREME COURT

SNELL, J.

Defendant, Gary Duane Kaster, was tried by jury and convicted of the crime of breaking and entering in violation of Section 708.8, The Code. The sole issue presented on appeal is whether there was sufficient evidence to sustain the verdict as a matter of law. We hold the evidence was not sufficient and accordingly reverse the judgment.

Defendant was prosecuted for breaking and entering the Half Moon Inn, a bar and restaurant located at Clear Lake, Iowa. The breakin occurred during the early morning hours of September 9, 1975, and a quantity of cigarettes and liquor was taken. At the same time, or a few hours later, a stereo tape deck, radio, television set, beef roast, commercial blender, and a knife were also taken. The State's theory is that Kaster was a principal involved in the crime or aided and abetted another in the breakin.

Kaster admitted he had been drinking during the evening of September 8th with Charles Stepleton, Lloyd Lindsay and a person known only as Kato. The four made the rounds to various bars for several hours. When Stepleton and Kato left the last bar, at which all four were present, they agreed to meet Kaster and Lindsay at a bar called D-J's. When Lindsay and Kaster arrived at D-J's they could not find the other two.

Stepleton and Kato had gone to Stepleton's girlfriend's house to stay the night. The girlfriend was Connie Case, who lived in a house at Ventura Heights, Iowa, near Clear Lake. On arriving at her house, they went immediately to bed.

About three o'clock in the morning, Kaster and Lindsay arrived and wanted to know if they could stay the night. Stepleton said they could sleep on the floor because there was only one bed. At that time Stepleton testified he didn't see either of them bring anything in. He turned around and went

back to bed.

He was awakened about 4:30 a.m. by people talking and got up. He went to the kitchen and found Kaster, Lindsay and Kato there. He sat down for some drinks with them and talked for a while. On the table were three to five bottles of whiskey and a few packs of cigarettes. He testified that he didn't pay much attention. The next day he saw a blender in the kitchen, or nearby, a knife and some cooked meat. The knife was identified at trial as taken from the Half Moon Inn. Stepleton later gave the blender to a girlfriend and admitted taking two bottles of liquor. For his testimony on behalf of the State, he was promised immunity from prosecution for possession of stolen property.

Stepleton testified that he left the Case house between nine and ten in the morning. Kato, Lindsay and defendant Kaster all left an hour or so before. Stepleton did not see what, if anything, they took with them.

The State relies for conviction on the testimony of Stepleton and his girlfriend, Connie Case. Connie testified that Stepleton and Kato arrived at her house at about 12:30 a.m. She let them in and Stepleton went to bed with her and Kato slept on the floor downstairs. She was awakened by voices and went downstairs to the kitchen to investigate. Defendants Kaster and Lindsay were in the kitchen. She observed cigarettes, liquor and food on her kitchen table. There were three containers of meat, tupperware and about 50 loose packs of cigarettes. There were boxes of liquor and a blender. She also noticed a knife among the other goods. Lloyd Lindsay took some cigarettes and matchbooks from his pocket and threw them on the table. The printing on the matchbooks said "The Half Moon". Connie then got Stepleton out of bed because she didn't know who Lindsay was. Stepleton got out of bed and joined all of them around the table for drinking

and talking. She testified that there was no conversation about where all of these items came from. The only explanation made, according to Connie, was that "he said they had been shopping". Neither "he" nor "they" are further identified. She did not learn where they had been or where they had shopped. She testified that after about 45 minutes Lloyd Lindsay said that he wanted to go and get a T.V. Thereupon, Lindsay and defendant Kaster left together. Connie stayed up to wait for them. About a half hour later, Lindsay and Kaster returned. Lindsay carried in a tape deck then went back out and carried in a T.V. She testified that they did not tell her where they had gotten these items. All of them sat around for a bit and then went to bed.

When Connie got up the next morning, she cooked breakfast and afterwards the others left. Lindsay and Kato left together. She testified they took the T.V. and the tape deck. Kaster left about 10 or 10:30. She did not see him take anything with him. She stated that she did not inquire where all of these things came from because she didn't want to know.

Some weeks later, Connie gave this information to the police after she and Stepleton had a fight and she was trying to get her car back from him. Connie understood she was also given immunity from prosecution for receiving stolen property.

Defendant Kaster testified he went to Connie's house after the rounds of drinking and spent the night there. He denies that he was involved in the crime charged.

At the close of the State's evidence, defendant moved the court to direct a verdict of acquittal on the ground that the State had failed to present sufficient evidence to establish defendant's guilt beyond a reasonable doubt. The trial court overruled the motion. Defendant renewed this motion at the close of all the evidence. The motion was again overruled.

On a motion for directed verdict, the evidence must be viewed in the light most favorable to the State. The trial court should submit the case to the jury if there is any evidence reasonably tending to support the charge. State v. Pardock, 215 N.W.2d 344, 346-47 (Iowa 1974); State v. Gray, 216 N.W.2d 306, 308 (Iowa 1974); State v. Dewey, 220 N.W.2d 629 (Iowa 1974); State v. Young, 211 N.W.2d 352, 354 (Iowa 1973).

In the *Pardock* case defendant was charged with operating a motor vehicle while under the influence of alcohol. Two police officers observed defendant driving his car in an erratic manner, followed him and made the arrest. In *Gray*, the issue was consent in a rape case. The court held it is for the jury to determine credibility of witnesses; a finding of guilty is binding on the appellate court unless without substantial support in the record. In *Dewey*, defendant was convicted of assault with intent to commit robbery. The evidence showed that defendant drove his vehicle to the entrance to Paul's Discount Store where he picked up another who had just robbed the store. Defendant was seen doing so by a police officer.

The defendant in *Young* was jointly indicted with Yoakum for the crime of robbery with aggravation. A trial jury acquitted Yoakum. Another jury tried Young and convicted him. Yoakum allegedly robbed the Super Value Store, left, ran through a big yard to where the defendant had stopped his station wagon, and hollered, "Hey". Defendant backed his vehicle, Yoakum entered, and the defendant drove from the scene. The robbery was immediately reported, alerting police cars in the vicinity. Two police car officers saw the defendant's car, stopped it and observed defendant, the stolen merchandise and Yoakum hiding in the vehicle. Other supporting evidence was introduced. The supreme

court held there was substantial evidence reasonably supporting the charge, such that a directed verdict of acquittal was not mandated and the case was properly submitted to the jury.

In each of these cases, the evidence was sufficient to sustain the verdict. Direct evidence showed defendant at or near the scene of the crime at a time close to its commission. In the case at bar there is no direct evidence that Kaster was at or near the Half Moon Inn at the time of any breakin.

Absent direct evidence a jury question may nevertheless be generated solely by circumstantial evidence. Participation in a crime may be inferred from the presence, companionship and conduct before and after the crime is committed. State v. Young, 211 N.W. 2d 352, 354 (Iowa 1973).

The common purpose among two or more persons to commit a crime need not be shown by positive evidence, but may be inferred from the circumstances surrounding the act and from one's conduct before, at the time of, and after commitment of the illegal act. State v. Kneedy, 232 Iowa 21, 28; 3 N.W.2d 611 (1942). In such cases, the evidence which would support a conviction as a principal ordinarily would also support a charge as an accessory for the distinction between principal and accessory before the fact has been abrogated. Section 688.1, The Code. Any participation in a general felonious plan, provided such participation may be concerted, and evidence of actual or constructive presence at its commission is generally held sufficient to render one criminally liable as a principal. State v. Kneedy, supra.

The State's position is that defendant is guilty as a principal or as an aider and abettor of Lindsay. See State v. Kittelson, 164 N.W.2d 157, 164 (Iowa 1969) re distinction between aiding and abetting before the fact and after the fact.

The State's evidence shows that Kaster was present with Lindsay before the commission of the crime, after the commission of the crime and that he was present at the house of Connie Case when the stolen items were there. There is also evidence that he left the house with Lindsay, came back with Lindsay and Lindsay brought more stolen items into the house. The record contains no evidence, however, direct or circumstantial, of Kaster's participation as a principal in the breakin.

The court instructed the jury on the participation of a defendant who aids and abets a principal. In order to obtain a conviction on this theory, the State must show Kaster assented to or lent countenance and approval to the criminal act either by active participation in it or by in some manner encouraging it prior to or at the time of its commission. "Knowledge is essential, but neither knowledge nor mere proximity to the scene of the crime is sufficient in itself to prove aiding and abetting. When circumstantial evidence is relied on, it must be sufficient for the jury to say it excludes any rational hypothesis of innocence." State v. Vesey, 241 N.W.2d 888, 891 (Iowa 1976).

In the case at bar there is evidence of knowledge after the crime, but no evidence of defendant's proximity to the scene of the crime. Compare State v. Vesey, supra, where the evidence showed that defendant was at the scene of the crime, a gas station, with his friend when it was broken into and robbed. The conviction was reversed on the ground there was no corroborative evidence showing that defendant participated either as principal or aided and abetted. Without it the evidence was consistent with defendant's innocence.

In State v. Barnes, 204 N.W.2d 827 (Iowa 1972), defendant was convicted by jury of larceny in the nighttime. The record

was undisputed that the larceny was committed by a friend of the defendant. The State's theory was that defendant was also guilty in that he aided and abetted his friend in the theft. The State's case rested almost entirely upon defendant's presence in the office of the Skelly Station at the time of the theft. There was no direct evidence that defendant saw the theft or even knew of it until after it occurred.

A defendant cannot be convicted of crime on the theory of aiding and abetting unless there is sufficient evidence to show he assented to or lent countenance and approval to the criminal act either by active participation in it or by some manner encouraging it prior to or at the time of its commission. State v. Kittelson, 164 N.W.2d 157, 161, 165 (Iowa 1969). Participation, as in aiding and abetting accomplice, may be proved by circumstantial evidence. State v. Patman, 189 N.W.2d 620, 622 (Iowa 1971). Circumstances which may be considered include those surrounding the act and defendant's subsequent conduct. State v. Horrell, 260 Iowa 945, 952, 151 N.W.2d 526, 531 (1967). Subsequent conduct is relevant only insofar as it tends to prove defendant's prior encouragement or participation. A defendant may not be convicted as a principal on a theory of aiding and abetting for conduct which would only make him an accessory after the fact. State v. Kittelson, supra. Cf. Section 688.1, The Code. In order to find the evidence adequate to support the verdict, we must be able to say that it is sufficient to raise a fair inference of guilt. It must do more than raise a suspicion, speculation or conjecture. State v. Barnes, 204 N.W.2d 827, 829 (Iowa 1972); State v. Williams, 179 N.W.2d 756, 758 (Iowa 1970).

The court in State v. Fonza observed "Factually the pro-

secution's case suffers from anemia." State v. Fonza, 254 Iowa 630, 631, 118 N.W.2d 548 (1962). Such is the case here.

Under this record there is no direct evidence of Kaster's participation in the crime either as a principal or as an accessory before the fact. Nor is there any evidence, direct or circumstantial, of Kaster's encouragement prior to or at the time of the crime. The circumstantial evidence produced by the State bears on the question of defendant being an accessory after the fact, but defendant has not been so charged. The State's circumstantial evidence also raises a suspicion, speculation or conjecture that defendant Kaster may have participated in the breakin. However, such evidence falls short of being substantial. The record discloses nothing more than Kaster's association prior to and after the crime with Lindsay, who is more directly implicated by the testimony of Charles Stepleton and Connie Case. A conviction based upon such tenuous evidence cannot stand. The best way to prevent conviction of the innocent is to require the State to prove guilt by substantial evidence. The State failed to meet its burden. The trial court should have sustained the motion for directed verdict of acquittal.

In reaching this result we have assumed that Stepleton and Case were not accomplices and have fully considered the evidence supplied by these witnesses without regard to corroboration. Our determination of the appeal makes it unnecessary to consider defendant's alternative contention that these witnesses were accomplices as a matter of law.

The case is reversed and remanded for entry of judgment dismissing the charge against defendant Kaster. Reversed and remanded with instructions.