FILED
MAR 26 1985
CLERK SUPREME COURT

**IN THE COURT OF APPEALS OF IOWA**

**STATE OF IOWA,** )

Plaintiff-Appellee, ) Filed March 26, 1985

vs. )

**DONEY HOWARD, JR.,** ) 5-88
84-600

Defendant-Appellant. )

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Appeal from the Iowa District Court for Black Hawk County - Dennis D. Damsgaard, Judge.

Defendant appeals from judgment and sentence for burglary in the second degree in violation of Iowa Code section 713.5 (1983), and for being an habitual offender in violation of Iowa Code sections 902.8 and 902.9(2). REVERSED AND REMANDED.

Charles Harrington, Appellate Defender of Iowa, and Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Pamela S. Greenman, Assistant Attorney General, for plaintiff-appellee.

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

**HAYDEN, J.**

Defendant claims there was insufficient evidence to sustain his conviction of second degree burglary. We agree.

The State presented the following evidence at trial. On the morning of June 30, 1983, employees of a Payless Shoe Store discovered that the back door of the store was broken and four pairs of Honcho brand boots were missing. Honcho brand boots were only carried by Payless Shoes. The boot boxes were left in the store and the manager was able to identify the stock numbers of the stolen boots.

On July 9, 1983, a police officer searched the defendant's 1964 Ford pickup and seized a pair of Honcho brand boots. The identification number on the boots matched the number of one of the pairs missing from Payless Shoes. Fifteen days after the offense, police searched the home of the defendant's parents and seized three more pairs of Honcho brand boots. The identification numbers of the boots corresponded with the numbers of the other missing boots. The defendant was charged with second degree burglary.

At the close of the State's case-in-chief, the defense moved for a directed verdict of acquittal on the grounds that there was insufficient evidence to convict the defendant. The trial court reserved its ruling on the motion. The defense renewed its motion for a directed verdict at the close of the case. The court reserved its ruling again. The jury found the defendant guilty of second degree burglary. In a later proceeding the defendant was found to be an habitual offender. Prior to the defendant's sentencing, the trial court overruled the motions for directed verdict.

The standard of review which applies upon a challenge to the sufficiency of the evidence has been clearly established by the Iowa Supreme Court:

> When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the state, including all legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. It is necessary to consider all of the evidence and not just the

> evidence supporting the verdict. A jury verdict is binding upon this court and will be upheld unless the record lacks substantial evidence to support the charge. Substantial evidence means evidence which would convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt.

State v. Blair, 347 N.W.2d 416, 419 (Iowa 1984); State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981); State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981).

In the case of State v. Lewis, 242 N.W.2d 711, 723 (Iowa 1976), the Iowa Supreme Court held:

> In our opinion bare proof of possession of property recently stolen does not permit, as a matter of law, the rational juror to conclude beyond a reasonable doubt the possessor committed the break in since possession alone could well support an inference of guilt for other crimes besides burglary. Consequently, where a party in possession of recently stolen property is charged with burglary there must be evidence in the record relating to the surrounding circumstances for the jury to consider in determining whether the evidence warrants a finding beyond a reasonable doubt of the presumed fact defendant committed the breaking and entering from the proved fact he possessed recently stolen property.

In the instant case there is no evidence in the record relating to any surrounding circumstances for the jury to consider in determining whether the evidence warranted a finding beyond a reasonable doubt of the presumed fact defendant committed the breaking and entering from the proved fact he possessed recently stolen property.

We do not say the stolen boots found in defendant's pickup nine days after they were stolen or the three pairs found in defendant's father's laundry room and attic fifteen days afterwards is so recent in time as to constitute possession of recently stolen property. In Lewis the defendant was found in possession of the stolen property within a few hours after the property was stolen.

For a conviction, the evidence must generate something more than "suspicion, speculation, or conjecture." State v. Jellema, 206 N.W.2d 679, 682 (Iowa 1973). In the instant case, the evidence fails to show anything more than

speculation concerning the defendant's involvement in the break in at the Payless Shoe Store. Suspicion is no substitute for proof. The best way to prevent conviction of the innocent is to require the State to prove guilt by substantial evidence. State v. Barnes, 204 N.W.2d 827, 829 (Iowa 1972). Here the State failed to produce sufficient evidence that defendant broke into the shoe store with the intent to commit a theft, the trial court erred in overruling defendant's motions for judgment of acquittal.

We reverse and remand to the trial court to enter a judgment of acquittal of the defendant.

REVERSED AND REMANDED.