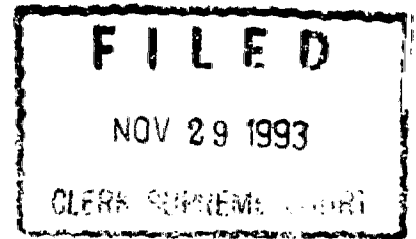


IN THE COURT OF APPEALS OF IOWA

No. 3-528 / 92-1862



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STATE OF IOWA,

Appellee,

vs.

WILLIAM LEROY DOUGLAS, JR.,

Appellant.

Appeal from the Iowa District Court for Wayne County,
Thomas S. Bown, Judge.

The defendant appeals a judgment of the district court, following a jury trial, finding him guilty of possession of burglar's tools in violation of Iowa Code section 713.7 (1991). **AFFIRMED AND REMANDED FOR RESENTENCING.**

Sherman W. Phipps of Phipps & Rolfe, Lamoni, for appellant.

Bonnie J. Campbell, Attorney General, Robert P. Ewald, Assistant Attorney General, and Alan M. Wilson, County Attorney, for appellee.

Considered by Oxberger, C.J., and Hayden and Habhab, JJ. Donielson, J., takes no part.

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HAYDEN, J.

Defendant William Douglas, Jr. appeals his conviction for possession of burglar's tools in violation of Iowa Code section 713.7 (1991).

At approximately 10 p.m. on March 20, 1992, Officer Shelley overheard a radio transmission advising the dispatcher to have another officer observe a white Ford Escort traveling on Highway 2 toward Corydon. The vehicle had been observed with its blinkers flashing left, then right, and making a U-turn on the highway.

Officer Shelley was preparing to go on duty when he overheard the transmission. He left his residence, which is located at the end of Madison Street in Corydon. He proceeded down Madison Street and turned onto West Street when he saw the white vehicle with Polk County plates turn off Highway 2 and onto West Street. Shelley observed the vehicle turn on its right turn signal and turned right onto Madison Street, which is a dead end street. Shelley followed the vehicle but lost sight of it momentarily as it went over a hill. When Shelley came over the hill, he observed a fold-up ladder lying in a vacant lot next to his residence. The officer claims the ladder was not present when he left his residence just a few minutes before. Shelley also observed the vehicle turn around in his driveway.

As Officer Shelley passed the white vehicle he noted the occupants were not wearing seat belts. The officer

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stopped it. He had all three occupants of the vehicle get out and place their hands on the top of the vehicle. Officer Metzger then arrived on the scene. Shelley identified the driver as William Davis, Jr. After being searched for weapons, Davis was taken into custody. Shelley then identified the front-seat passenger as the defendant, William Douglas, Jr. No weapons were found on Douglas, but Shelley discovered plastic bags in Douglas's pants pockets. Douglas was then taken into custody.

The back-seat passenger, Jerry Woolery, Jr., was searched for weapons. In a pat-down search the officers found cotton gloves and a mini-flashlight in Woolery's coat pocket. Shelley then looked into the front-seat area of the vehicle and saw a box of garbage bags and a portable scanner. In the back seat he observed a cordless drill and two axes. Other items were found in the vehicle including pliers, another police scanner, and another mini-flashlight.

On March 31, 1992, Douglas was charged by trial information with possession of burglar's tools in violation of Iowa Code section 713.7. Davis and Woolery were charged separately with the same offense, and the three cases were consolidated for trial. On May 28, 1992, Woolery filed a motion to suppress, challenging the stop of the vehicle. At a hearing on the motion the district court allowed the motion to apply to all three men. The court overruled the motion to suppress.

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At trial, Officer Shelley testified the items found in the vehicle were consistent with those known to be used in the commission of burglaries. The officer stated these scanners could pick up local law enforcement frequencies. He agreed the items found also had legitimate purposes. Shelley testified he had no evidence anything was taken on the night in question.

Woolery testified at trial and gave his explanation of the situation and presence of the items seized from the white vehicle. He stated Davis had possession of the white vehicle because he was test driving it for a few days. He alleged the items in the vehicle belonged to its owner. Woolery stated he and Davis went to Douglas's farm near Osceola in order to buy a hog to butcher. After arriving at the Douglas farm, Woolery testified they used the gloves and flashlight to select a pig because it was dark and muddy. Afterwards, Douglas stated he wanted to go to a farm auction scheduled near Allerton, in Wayne County, and wanted to make sure the items he wanted to buy were still on the list of items to be sold. Davis offered to use his vehicle to drive. Woolery testified on the way to Allerton they became lost. Woolery stated they ended up on Madison Street, and when they discovered it was a dead end, they turned around in the driveway of the house on the end of the street. Woolery testified they did not throw out the ladder found in the vacant lot and also testified it would have been impossible to have the ladder in such a small

car. Woolery stated no one was aware the tools were burglar tools and also stated no one discussed committing a burglary.

Prior to the submission of this case to the jury, Douglas moved for a judgment of acquittal. The court overruled the motion.

The jury returned a verdict of guilty as charged. The district court denied Douglas's motion for new trial. The district court sentenced Douglas to a term of imprisonment not to exceed two years. Douglas has appealed.

I. Motion for Judgment of Acquittal. Douglas contends the trial court erred in overruling his motion of acquittal because the evidence failed to sustain a conviction of possession of burglar's tools beyond a reasonable doubt. Douglas argues the items seized belonged to someone else, who the police could not locate. He contends there was no evidence any one of the three individuals in the vehicle knew the items seized were in the vehicle. Douglas claims the State failed to prove any of the three individuals had the intent to commit a burglary.

In reviewing the trial court's disposition of the motion we give its fact findings the effect of a jury's special verdict. State v. Knupp, 310 N.W.2d 179, 181-82 (Iowa 1981) (citation omitted). We examine all the evidence in the light most favorable to the State. Id. We accept all legitimate inferences reasonably deducible from the evidence and uphold an order if substantial evidence

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supports it. Id. (citations omitted). Substantial evidence means such evidence as could convince a rational trier of fact an element of the crime has been proved beyond a reasonable doubt. Id. (citations omitted).

The elements of the crime of possession of burglar's tools are: (1) any person who possesses any key, tool, instrument, device or any explosive, (2) with the intent to use it in the perpetration of a burglary. Iowa Code § 713.7 (1991); see State v. Salkil, 441 N.W.2d 386, 388 (Iowa App. 1989). Prosecution for possessing burglars' tools involves "possession," not ownership. State v. McHenry, 207 Iowa 760, 770, 223 N.W. 535, 540 (1929). It is sufficient if the tools are within a defendant's dominion and subject to his control. State v. Kappen, 191 Iowa 19, 22, 180 N.W. 307, 310 (1920). Burglar's tools are implements which, when assembled in combinations have such character as those commonly used to commit the crime of burglary. Mahar v. Lainson, 247 Iowa 297, 299-300, 72 N.W.2d 516, 518 (1955), cert. denied, 350 U.S. 972 (1956). It is immaterial each implement or combinations of them may also be used for an honest and legal purpose. Id. (citations omitted).

In overruling the motion the district court noted the items seized together with the time, place, and circumstance. Officer Shelley explained to the jury how each item found in the vehicle could be used to commit a burglary. The tools in the vehicle were within Douglas's

dominion. Douglas's possession of the tools and scanners was subject to explanation at trial. The credence and weight to be given to any such explanations was a question for the jury. Id. (citing State v. Furlong, 216 Iowa 428, 249 N.W. 132 (1933)). We determine sufficient evidence exists from which the jury could have found Douglas guilty of possession of burglar's tools. We affirm on this issue.

II. Motion to Suppress. Douglas argues the district court erred in denying his motion to suppress evidence seized. The basis of his motion is the police had no reasonable cause for stopping the vehicle. This issue was properly preserved for appeal.

On appeal Douglas also tries to argue the officer violated his constitutional rights by ordering him out of the vehicle after the stop. We find this issue was not raised in the district court and not preserved. We do not address this latter issue on appeal. State v. Traywick, 468 N.W.2d 452, 455 (Iowa 1991).

Our scope of review of the district court's ruling on the motion to suppress is de novo. State v. Scott, 409 N.W.2d 465, 468 (Iowa 1987). We evaluate the totality of the circumstances. State v. Hilpipre, 242 N.W.2d 306, 309 (Iowa 1976).

Circumstances for an investigatory stop exist "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experiences that criminal activity may be afoot." State v. Donnell, 239

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N.W.2d 575, 577 (Iowa 1976) (citing Terry v. Ohio, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884, 20 L. Ed. 2d 889, 911 (1968)); see State v. Garcia, 461 N.W.2d 460, 463 (Iowa 1990), cert. denied, 499 U.S. 909, 111 S. Ct. 1115, 113 L. Ed. 2d 223 (1991).

The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for a probable cause arrest to simply shrug his shoulders and allow a crime to occur. Adams v. Williams, 407 U.S. 143, 145, 92 S. Ct. 1921, 1923, 32 L. Ed. 2d 612, 616 (1972). Nor does that amendment ordinarily prohibit, as an illegal "search," a plain view observation made by a police officer from a position where the officer is entitled to be. United States v. Johnson, 506 F. 2d 674, 675 (8th Cir. 1974), cert. denied, 421 U.S. 917, 95 S. Ct. 1579, 43 L. Ed. 2d 784 (1975).

Donnell, 239 N.W.2d at 577. Officer Shelley testified the occupants were not wearing seat belts before he stopped the vehicle. "The officer is bound by the true reason or reasons for making the stop; that is, the officer may not rely on reasons that he or she could have had but did not actually have." Garcia, 461 N.W.2d at 464 (Westendorf v. Iowa Dep't of Transp., 400 N.W.2d 553, 556 (Iowa 1987) (citation omitted)). The stop was lawful because when an officer observes a traffic offense--however minor--he has probable cause to stop the vehicle. State v. Cummins, 920 F.2d 498, 500 (8th Cir. 1990), cert. denied, --- U.S. ---, 112 S. Ct. 428, 116 L. Ed. 2d 448 (1991).

We determine this investigatory stop was based upon reasonable grounds. The trial court properly overruled the motion to suppress. We affirm on this issue.

III. Jury Instruction. The jury was instructed it could find defendant guilty either as a principal or as an aider and abettor in the offense of possession of burglar's tools.

Douglas contends the trial court erred in using an incomplete and erroneous aiding and abetting instruction. Douglas's contention is based on a comment following Iowa Criminal Jury Instruction 200.8 which includes a paragraph to be added to an aid and abet instruction if the offense involved requires specific intent. The comment states "[a]dd the following paragraph if the offense involves specific intent" Douglas alleges the district court's failure to include this additional paragraph constituted error.

The intent required by section 713.7, possession of burglar's tools, is a general, not specific, burglarious intent, purpose, plan, or design of the possessor of the tools for having such tools. State v. Hobbs, 252 Iowa 432, 435-36, 107 N.W.2d 238, 240 (Iowa 1961) (citing State v. Hefflin, 89 S.W.2d 938, 945 (Mo. 1935)); see Mahar, 247 Iowa 297, 72 N.W.2d 616. We conclude the trial court did not err by refusing to include specific intent elements in the jury instruction. We affirm on this issue.

IV. Sentence. Douglas claims the trial court erred by failing to state the reasons for the sentence imposed. The State agrees this claim is correct.

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Iowa Rule of Criminal Procedure 22(3)(d) requires a sentencing court to state on the record the reason for selecting the particular sentence. The purpose of this requirement is to allow a reviewing court to determine if there has been an abuse of discretion. State v. Mickens, 462 N.W.2d 296, 299 (Iowa App. 1990) (citations omitted).

The trial court in this case failed to state on the record the reasons for the sentence imposed upon Douglas. We affirm the conviction and remand for resentencing.

V. Ineffective Assistance. Generally, ineffective assistance of counsel claims are preserved for postconviction relief proceedings to allow trial counsel an opportunity to defend the charge. State v. Mulder, 313 N.W.2d 885, 890 (Iowa 1981), cert. denied, 459 U.S. 841 (1982); State v. Nebinger, 412 N.W.2d 180, 191-92 (Iowa App. 1992). Where the record is inadequate to permit us to resolve the claim, we preserve the claim in order to provide the allegedly ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). The record is not sufficient for us to resolve this issue. Defendant's ineffective assistance claim is preserved for possible postconviction proceedings.

AFFIRMED AND REMANDED FOR RESENTENCING.

Habhab, J., concurs; Oxberger, C.J., dissents.

OXBERGER, C.J. (dissenting)

I respectfully dissent.

To constitute the crime of possession of burglar's tools, the defendant must possess items that have such character as those commonly used to commit the crime of burglary. Mahar v. Lainson 247 Iowa 297, 299-300, 72 N.W.2d 516, 518 (1955).

Items found in defendant's vehicle were: cotton gloves, two mini-flashlights, garbage bags, two police scanners, etc., cordless drill, two axes, and pliers.

I do not find these items meet the Mahar test. I would reverse the conviction.