

FILED

JAN 25 1990

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-516 / 88-1508

STATE OF IOWA,

Appellee,

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vs.

TALIDEAN KAMEL JOHNSON,

Appellant.

Appeal from the Iowa District Court for Scott County,
Margaret S. Briles and Edward B. deSilva, Judges.

Talidean Kamel Johnson appeals a judgment and sentence entered by the district court following a jury trial, finding him guilty of burglary in the second degree, theft in the second degree, and possession of burglar tools.

AFFIRMED.

Raymond E. Rogers, State Appellate Defender, and Linda Del Gallo, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sarah J. Coats, Assistant Attorney General, William E. Davis, Scott County Attorney, and Hugh J. Pries, Assistant Scott County Attorney, for appellee.

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

OXBERGER, C.J.

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Defendant Talidean Kamel Johnson (Johnson) appeals a judgment and sentence entered by the district court following a jury trial, finding him guilty of burglary in the second degree in violation of Iowa Code section 713.5 (1987), theft in the second degree in violation of Iowa Code sections 714.1(1) and 714.2 (1987), and possession of burglar tools in violation of Iowa Code section 713.7 (1987). Johnson contends a reasonable doubt exists that he had committed the crimes of which he was convicted. We affirm.

Johnson was convicted by a jury of second-degree burglary and theft and possession of burglar tools, stemming from a break-in at Alter & Sons, Inc., in Davenport. In March 1988 the Hammond, Indiana, police telephoned the owner of Alter & Sons to determine if he was missing a truck. The owner proceeded to the business, where he discovered the rear fence had been cut with bolt cutters, his 1988 truck was missing, and a hole had been punched through a concrete block wall of the warehouse. Several items of equipment were discovered missing.

The police took photographs of several tire tracks and foot impressions found at the scene. The foot impressions compared favorably with the tennis shoes worn by codefendant James Ray Mitchell (Mitchell). The jury found Johnson and Mitchell guilty. Johnson was sentenced to concurrent terms of ten, five, and ten years on the

respective charges. The trial court denied Johnson's post-trial motion for new trial. Johnson has appealed.

Our standard of review on Johnson's challenge to the sufficiency of the evidence to support the charges of burglary, theft and possession of burglar's tools is well settled. The verdicts will be upheld where there is substantial evidence to support the charges. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984).

The jury was instructed that Johnson could be found guilty if the evidence proved that he acted jointly with the codefendant in committing the offenses charged. Iowa Code section 703.1 (1987), provides:

All persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense or aid and abet its commission, shall be charged, tried, and punished as principals. The guilt of a person who aids and abets the commission of a crime must be determined upon the facts which show the part the person had in it, and does not depend on the degree of another's guilt.

Johnson contends that the State failed to introduce any evidence that he entered Alter & Sons or that he was even

at the crime scene at the time of the break-in. Johnson asserts that mere presence at the scene of the crime does not constitute sufficient evidence to warrant a conviction for burglary. Johnson further maintains that the guilt of a person charged with aiding and abetting must be determined upon the facts which show his part in the crime, and does not depend upon another's degree of guilt.

When a defendant is accused of aiding and abetting in the commission of a crime in which intent is an element, as here, substantial evidence must be in the record to support a finding the defendant either participated with the intent himself or with knowledge that the principal had the required intent. State v. Lott, 255 N.W.2d 105, 109 (Iowa 1977); State v. Lockheart, 410 N.W.2d 688, 693 (Iowa App. 1987). "Though mere presence of an accused at the scene of the crime does not of itself prove that he or she aided and abetted its commission, aiding and abetting need not be shown by direct proof, but may be inferred from circumstantial evidence, including presence, companionship, and conduct before or after the offense is committed." Lockheart, 410 N.W.2d at 693.

Upon applying the above principles to this case, we find there is substantial evidence to support Johnson's conviction of the burglary, theft and possession of burglary tools charges. Two sales employees of Alter & Sons testified that on March 24, 1988, the day before the

burglary, Johnson and Mitchell had been in the store. Johnson came into Alter & Sons and asked to rent a small hammer drill that Alter & Sons sells, but does not rent. Codefendant Mitchell appeared in Alter & Sons and asked to purchase a drill that was not available in the store. The employees testified that both men appeared nervous and left the store quickly. The State asserts that the jury could infer that both Johnson and Mitchell purposefully asked for unavailable tools in the course of casing the store, and that Johnson's rush to leave and Mitchell's sudden disappearance were calculated to hamper later identification.

On March 25, 1988, at approximately 3:00 a.m. the Hammond police noticed a man standing in front of a van in a hotel parking lot. The police circled around a half-block area, and then shined their spotlight on the van. The officers noticed two red sneakers behind the van. As the police approached the van the man later identified as Johnson ran away. Inside the van the police discovered brand new tools with the name Alter & Sons on them. Next to the side door the police discovered a bag containing bolt cutters, pry bar, rope, a screwdriver, sledgehammer, and a map. Officer Raymond Rogalski testified that the tape around the sledgehammer is commonly used to cover up an alarm or to put over glass so that glass can be shattered without making a lot of noise. Ten

to twelve feet in front of the van was a truck with Iowa license plates registered to Alter & Sons that had its ignition punched out of it. Two sledgehammers also were found inside the truck. The police searched for the man they had seen run away from the van, and ultimately found Johnson hiding in a bathroom stall on top of a toilet in the hotel.

A short time later, as officer Smeberg was waiting for the van to be towed, codefendant Mitchell came walking towards the hotel. Officer Smeberg testified he stopped Mitchell because he matched the description of the person who was with Johnson when he fled. Mitchell stated to police that he had a friend who lived at the hotel.

Officer Kevin Murphy testified that on April 4, 1988, Mitchell confessed to the burglary. Mitchell told officer Murphy he had direct knowledge of the burglary at Alter & Sons, that he was the buyer, and that he was there and took inventory of the items. Murphy also testified Mitchell stated he, his partner and three men from the Quad Cities were involved in the burglary.

It is not required that intent be proved by direct evidence; intent is seldom so proved. State v. Furlong, 216 Iowa 428, 432 249 N.W. 132, 134 (1933). "Given that criminal intent is rarely susceptible to direct proof, the fact-finder may determine intent by such reasonable inference and deduction as may be drawn from facts proved

by evidence in accordance with common experience and observation." State v. Serr, 322 N.W.2d 96, 101 (Iowa 1982). In State v. Bass, 349 N.W.2d 498, 502 (Iowa 1984), the Iowa Supreme Court determined that "an individual's flight from the scene of a crime is a circumstance from which a jury may find the defendant departed because of his consciousness of guilt." We similarly believe Johnson's flight when the police approached the van after shining their spotlight on the van is a circumstance from which a jury may draw an inference of his consciousness of guilt. In addition, Johnson's running and hiding from the police in the hotel's communal bathroom in a toilet stall on top of the toilet can further provide a basis for a jury to infer Johnson's consciousness of guilt.

Johnson also claims that his mere presence near the stolen truck does not prove that he had taken control of the truck in Iowa with intentions to steal it.

At trial, Johnson did not testify or present any evidence. Mitchell presented the testimony of Johnson's wife. Mrs. Johnson testified that on March 24, 1988, her husband was with her at a card party that whole evening, while Mitchell had stayed at the party until 10:00 p.m. Mrs. Johnson's testimony is contrary to the testimony of the two Alter & Sons employees who testified that both Johnson and Mitchell were at their store on March 24. Additionally, the police officers testified that Mitchell

confessed that he was directly involved in the burglary at Alter & Sons. It is for the trier of fact to determine the credibility of the witnesses and the weight of the evidence. State v. Blair, 247 N.W.2d 416, 420 (Iowa 1984).

Considering all the circumstances and viewing the evidence in the light most favorable to the State, we concluded that sufficient evidence does exist in the record from which the jury could have found Johnson guilty of aiding and abetting James Ray Mitchell in committing the crimes of second-degree burglary, second-degree theft and possession of burglary tools. We find there is substantial evidence to support the jury's determination that the State proved beyond a reasonable doubt that Johnson aided and abetted the crimes for which he was charged. The verdicts and sentences of the defendant are affirmed.

AFFIRMED.