

IN THE COURT OF APPEALS OF IOWA

No. 7-563 / 96-1601

000345

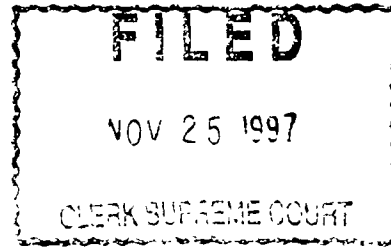
STATE OF IOWA,

Plaintiff-Appellee,

vs.

WILLIAM FREDERICK FUTRELL,

Defendant-Appellant.



Appeal from the Iowa District Court for Marshall County, Timothy J. Finn and
Carl E. Peterson, Judges.

Defendant appeals from his conviction for second-degree burglary in violation
of Iowa Code sections 713.1 and 713.5(1) (1995) and possession of a firearm by a
felon in violation of Iowa Code section 724.26. **AFFIRMED.**

Mark D. Reed of Bertroche Law Offices, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney
General, and James DeTaeye, County Attorney, for appellee.

Considered by Streit, P.J., and Vogel and Mahan, JJ.

MAHAN, J.

Defendant William Futrell challenges his conviction for one count of second-degree burglary and one count of having dominion or control over a firearm by a felon. He challenges the sufficiency of the evidence to support his convictions and argues the district court improperly instructed the jury on the inference of guilt arising from the possession of recently stolen property. We affirm.

On April 20, 1996, at approximately 9:00 a.m. an Iowa state trooper observed a car pass with out-of-county plates. He thought it unusual for an "odd" county plate to be in the area at that time with three male occupants. The trooper ran a license plate check. The check revealed the car had been stolen. The trooper caught up with the vehicle and attempted to stop it, but the vehicle sped off and a chase ensued at speeds between seventy and seventy-five miles per hour. The driver also committed other traffic violations. During the chase the trooper noticed items being thrown out of the vehicle. These items were later determined to be checkbooks owned by the victim of a burglary. The trooper utilized a video recording unit in his vehicle capturing much of the chase and eventual stop of the vehicle.

When the vehicle did finally stop, the occupants escaped. Futrell exited the rear passenger door carrying a cloth long rifle gun case. The trooper examined the car and found items leading him to believe the suspects may have been involved in a burglary. At approximately 4:00 p.m., after conducting a massive search, the police located Futrell and another suspect in a ravine about three quarters to one mile away.

The victim reported several items missing, including loose change from a jar, two bags, an SKS assault rifle, a pool cue with chalk and sharpeners, and binoculars. Only the assault rifle was never recovered.

I. JURY INSTRUCTION. Futrell contends the trial court improperly instructed the jury about the inference of guilt when in possession of recently stolen property. We review jury instructions for an abuse of discretion. *State v. Holtz*, 548 N.W.2d 162, 168 (Iowa App. 1996). The trial court has a duty to instruct fully and fairly on the law regarding all issues raised by the evidence. *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996). The court will not find an abuse of discretion unless such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Selestian*, 515 N.W.2d 356, 358 (Iowa App. 1994). The burden of proving abuse of discretion lies with the defendant. *Id.* Any error in jury instruction must be prejudicial to warrant reversal. *Holtz*, 548 N.W.2d at 168. The supreme court has previously stated:

In our opinion bare proof of possession of property 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.

* * *

It is evident each case will be considered in light of its own peculiar factual setting in making the determination whether the

standard of reasonable doubt entailed in the very concept of due process has been satisfied.

State v. Lewis, 242 N.W.2d 711, 723 (Iowa 1976). In this instance, the court instructed the jury:

If you find the State has proven beyond a reasonable doubt each and all of the following facts, then you may, but are not required to, infer that the Defendant broke the residence of Kerry Abrahams:

1. That the property claimed to have been stolen from Kerry Abrahams was, in fact, stolen at the time such residence was broken.
2. That the Defendant had unexplained possession of that property.
3. That the Defendant's possession of that property was recent.

What is recent possession of property cannot be precisely determined. The nature of the property, its ease of transfer and all other facts and circumstances shown are to be considered as bearing on whether the interval between the time of the alleged burglary and that of Defendant's alleged possession was so short as to render it reasonably certain that there could have been no immediate change of possession.

It is important that you keep in mind that it is your exclusive province as jurors to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits you to draw from possession of recently stolen property, and you are not required to make this inference. If any possession a Defendant may have had of recently stolen property is consistent with innocence, or if you entertain reasonable doubt of guilt, then you must acquit the Defendant.

This is virtually the same instruction as the one given by the trial court in *State v. Hall*, 371 N.W.2d 187, 188-89 (Iowa App. 1985). Among the cases referred to in *Hall* and *Lewis* is the Michigan case of *People v. Hutton*, 50 Mich. App. 351, 213 N.W.2d 320 (1973). The holding in *Lewis* follows the reasoning of *Hutton* quite closely. The Iowa supreme court stated, "[T]he conviction for burglary in *Hutton* was

upheld due to defendant's false story, the possession's close proximity to the time of the break in, and defendant's evasive action." *Lewis*, 242 N.W.2d at 722.

In this case the break in of the victim's home took place close in time to the chase of the car. During the high speed chase, the suspects ran stop signs and broke the speed limit. Items later discovered to be the victim's checkbooks were thrown out the vehicle window. When the car finally stopped, Futrell jumped out of the car carrying a gun case, slid under a fence, and ran to evade capture. The defendant hid until he was found later in the afternoon. When he was found he was uncooperative. Much of this was captured on videotape and seen by the jury. We find these facts were sufficient to warrant the trial court's instruction to the jury.

II. SUFFICIENCY OF THE EVIDENCE. Futrell claims there was insufficient evidence in the record for a rational jury to conclude he was guilty of second-degree burglary and dominion and control over a firearm as a felon. We review challenges to the sufficiency of evidence for errors at law. Iowa R. App. P. 4; *State v. Kraklio*, 560 N.W.2d 16, 17 (Iowa 1997). In evaluating such a claim we view the evidence in a light most favorable to upholding the jury's verdict. *Kraklio*, 560 N.W.2d at 17. We give the State all reasonable inferences and presumptions the evidence will bear. *State v. Liggins*, 557 N.W.2d 263 (Iowa 1996). The verdict is binding on us unless the record contains no substantial evidence to support it. *Kraklio*, 560 N.W.2d at 17. Evidence is substantial if it could convince a rational trier of fact that the accused is guilty beyond a reasonable doubt. *Id.* Direct and

circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive. *Liggins*, 557 N.W.2d at 269. Additionally, discrepancies in testimony, in and of themselves, do not preclude proof beyond a reasonable doubt. *See generally State v. Phanhsouvanh*, 494 N.W.2d 219, 223 (Iowa 1992) (jury could adopt evidence it found credible); *State v. Forsyth*, 547 N.W.2d 833, 836 (Iowa App. 1996) (jury's function to determine credibility and resolve conflicts in evidence). A jury's assessment of credibility may only be ignored on appeal when the testimony is so impossible, absurd, and self-contradictory that it may be deemed a nullity. *See State v. Smith*, 508 N.W.2d 101, 103 (Iowa App. 1993).

A. Second-Degree Burglary. A conviction of second-degree burglary requires the jury to find: (1) Futrell either broke or entered the residence; (2) the residence was an occupied structure; (3) he did not have permission or authority to break or enter; (4) he broke or entered with the specific intent to commit a theft; and (5) during the incident he had possession of a dangerous weapon. Futrell claims there is insufficient evidence of a forced breaking, that he possessed a firearm, or that he was involved at all.

1. Defendant's Involvement. Futrell argues no evidence places him at the scene of the burglary. We find the evidence of possession of recently stolen property

and Futrell's conduct created substantial evidence of his involvement in the burglary of the victim's home.

2. **Breaking.** The state correctly asserts it is not necessary for the occupied structure to be locked in order for a breaking to occur. *Bailey v. State*, 493 N.W.2d 419, 422 (Iowa App. 1992). The supreme court has said pushing open a partially open door is sufficient to comply with the statute. *State v. Murray*, 222 Iowa 925, 931, 270 N.W. 355, 358 (Iowa 1936). Thus, whether the entry was "forced" is inconsequential. Further, there was some evidence of a possible forced entry. The investigating officer discovered striation marks on the door. The officer could not tell whether the marks had been made that day or at another time. We find there is substantial evidence of a breaking.

3. **Possession of a Firearm.** Futrell argues there is no evidence he had possession of a gun during the burglary. He also argues there is no evidence he aided or abetted another person in possession of the gun and, even if he did, the gun was merely an item of loot and therefore the second-degree burglary conviction cannot stand.

The supreme court has said matters occurring after entry are of moment in elevating a burglary charge. *State v. Franklin*, 369 N.W.2d 716, 720 (Iowa 1985). We have previously stated possession of a weapon after entry is sufficient to elevate the crime of burglary. *State v. Olsen*, 482 N.W.2d 452, 456 (Iowa App. 1992).

In this instance, Futrell is seen on videotape running from the police carrying a gun case. Also, in the car Futrell had been riding in, the police found several items stolen from the victim's home. The State presented evidence the victim discovered his SKS assault rifle missing from his home while attempting to determine what had been stolen. There was conflicting evidence as to whether the gun case seen in the videotape was the victim's gun case. Also, questions were raised whether a gun was even in the case. We find the existence of the gun in the case was a logical inference for the jury to make. We also find there was substantial evidence to allow the jury to determine Futrell or one of the other suspects possessed the victim's gun while perpetrating the burglary.

B. Felon in Possession of a Firearm. To convict Futrell of being a felon in possession of a firearm, the State must prove Futrell: (1) was previously convicted of a felony; and (2) knowingly exercised dominion and control over a firearm. Iowa Code § 724.26 (1995). Futrell challenges the showing of exercising dominion and control. In the videotape Futrell is seen carrying a gun case. The victim is missing his gun and gun case. The suspects left several items in the car, including money, that were later identified as belonging to the victim. It is a logical inference Futrell would not have left behind the other items and taken an empty gun case. We find there is substantial evidence to support the jury's verdict.

For these reasons, we affirm the trial court and the jury's verdict.

AFFIRMED.