IN THE COURT OF APPEALS OF IOWA

No. 5-493 / 94-2001

STATE OF IOWA,

Appellee,

vs.

CLYDE HOFFMAN,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Phillip S. Dandos, Judge.

Defendant challenges the sufficiency of the evidence to support his convictions for third-degree burglary, fourth-degree theft, and fourth-decree criminal mischief.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Martha E. Boesen, Assistant Attorney General; Thomas S. Mullin, County Attorney; and James Katcher, Assistant County Attorney, for appellee.

Considered by Donielson, C.J., and Sackett and Cady, JJ.

DONIELSON, C.J.

The defendant challenges the sufficiency of the evidence to support his convictions for third-degree burglary, fourth-degree theft and fourth-degree criminal mischief. We affirm.

I. SUFFICIENCY OF THE EVIDENCE -- STANDARD OF REVIEW.

The defendant argues there was insufficient evidence to support a guilty verdict. When reviewing criminal convictions for sufficiency of the evidence, we review the evidence in a light most favorable to the State. *State v. McGrew*, 515 N.W.2d 36, 37 (Iowa 1994). A conviction is reversed only if there is no substantial evidence in the record supporting the verdict or the verdict is clearly against the weight of the evidence. *Id.* at 37-38. Substantial evidence is evidence that could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* at 38. A fair inference of guilt with respect to each element of the crime charged is sufficient to uphold a verdict. *Id.* We consider all of the evidence, not merely that supportive of the conviction, in determining the sufficiency of the evidence to support a guilty verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

II. BURGLARY -- THEFT.

The defendant concedes: 1) the building in question was an occupied structure; 2) he did not have the right, license, or privilege to enter the building; 3) a theft occurred; and 4) to gain entry to the building a window was broken. However, the defendant claims "the State has failed to establish that the defendant had personally committed the crimes or any legal theory exists that would make the defendant criminally liable."

We find there is sufficient evidence in the record to support the convictions. Two witnesses testified as to the defendant's presence among a small group of people when the display window of the Army-Navy Surplus Store was broken. Witness Earl Gagnon testified he heard glass breaking about a "half a block down" and he had no difficulty seeing the store on the well-lit street. He further testified he knew the defendant and saw him taking items out of the broken display window. Witness Emory Hines testified he also knew the defendant, and after he heard the glass break he observed the defendant in front of the broken window. It was the function of the jury to sort out and reconcile any conflicts which may have existed in the testimony given by Gagnon and Hines. *See State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993).

The observation of the defendant "taking things out of the display window" was evidence he entered the Army-Navy Surplus Store and took possession or control of property belonging to the store. There was sufficient evidence from which a

rational trier of fact could find the defendant guilty beyond a reasonable doubt of the crimes of burglary and theft.

III. CRIMINAL MISCHIEF.

While there is no direct evidence to establish the defendant was the person who broke the window, there was sufficient evidence to support his conviction as an aider and abettor of the criminal mischief charge. Those who aid and abet in the commission of an offense may be punished as principals. Iowa Code § 703.1 (1993). To convict one of a crime on the theory of aiding and abetting, the State must produce substantial evidence that the accused "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. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994) quoting *State v. Lott*, 255 N.W.2d 105, 107 (Iowa 1977).

The State must prove the accused knew of the crime at or before its commission and can prove such knowledge by direct or circumstantial evidence. *Lewis*, 514 N.W.2d at 66. "Although such knowledge is essential, neither knowledge nor proximity to the scene is--standing alone--enough to prove aiding and abetting." *Id.* However, such factors in combination with circumstantial evidence such as presence, companionship, and conduct before and after the offense is committed may be enough from which to infer a defendant's participation in a crime. *Id.*

In this case the defendant and two other men were in the bar where witness Gagnon worked. At one point during the evening, the defendant and the men were observed leaving the bar and returning a little over five minutes later. When the bar closed the defendant left with the men. Shortly thereafter the sound of breaking glass was heard and the defendant was seen in the presence of the same men in front of the broken storefront window. Immediately after the window was broken the defendant was observed removing items from it.

The defendant's companionship with the other men before the breaking of the window, his presence at the scene when the window was broken, and his subsequent removal of items from the store is sufficient evidence from which to find he participated in, or encouraged the breaking of, the window. There is sufficient evidence to support his conviction for the criminal mischief charge. We affirm his conviction on this count.

AFFIRMED.

Cady, J., concurs; Sackett, J., specially concurs without opinion.