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FILED

DEC 27 1979

CLERK SUPREME COURT

## IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

vs.

ALAN WILLIAM REINERT,

Defendant-Appellant.

Filed December 27, 1979

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63290

Appeal from Woodbury District Court - Donald M. Pendleton, Judge.

Defendant appeals his conviction upon a jury verdict of guilty to the crime of possession of burglar's tools in violation of section 708.7, The Code 1977. AFFIRMED.

Alan William Reinert, pro se, Fort Madison, Iowa.

Thomas A. Vakulskas of Sioux City, for defendant-appellant.

Thomas J. Miller, Attorney General; Julie Pottorff, Assistant Attorney General; and Rogert McEntaffer, Assistant Woodbury County Attorney; for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

## PER CURIAM

Defendant appeals his conviction upon a jury verdict of guilty to the crime of possession of burglar's tools in violation of section 708.7, The Code 1977. His contentions on appeal are that the trial court erred in: (1) admitting photographs of the doors that defendant allegedly attempted to force open; and (2) allowing the State to impeach defendant with his previous felony convictions. Defendant also argues that (3) there was insufficient evidence as to what constitutes burglar's tools and whether defendant had possession of any such tools. We affirm the decision of the trial court.

I. Defendant complains that the photographs of the doors of the bowling alley where he was apprehended show evidence of previously existing marks and scratches, which were apparently made during the course of other attempted break-ins. He asserts these exhibits contained evidence that defendant was guilty of other crimes and, therefore, the trial court should not have admitted these photographs into evidence.

The Iowa Supreme Court has held repeatedly that events and circumstances which immediately surround an offense may be shown even though they may incidentally show commission of another crime. State v. Garren, 220 N.W.2d 898, 900 (Iowa 1974); State v. Drake, 219 N.W.2d 492, 494 (Iowa 1974). The testimony of the arresting officers indicated defendant and another man had their hands on a prybar which was lodged between the doors of a bowling alley. Photographs of the doors were material to depict the scene of such activity as well as the fresh pry marks resulting therefrom. The fact that the photographs also revealed previously existing marks and scratches does not render them inadmissible. Moreover, as noted in the following division, the State did not attempt in any way to show that the existing marks and scratches were the result of prior criminal activity.

II. Defendant next contends the trial court improperly allowed the jury to infer his guilt from the fact of his two earlier felony convictions and the evidence of prior attempted break-ins shown in the photographs of the bowling alley doors. Although the State introduced the photographs of the bowling alley doors showing the marks and scratches, the State introduced no testimony indicating the marks and scratches resulted from prior attempted break-ins by defendant or anyone else. Furthermore, it was defendant, not the State, who introduced evidence of his two felony convictions into the record. Defendant made no record in the trial court to support any claim on appeal that such convictions were improperly used by the jury. See State v. Lyon, 223 N.W.2d 193, 194 (Iowa 1974).

III. Defendant also asserts that there was insufficient evidence as to what constitutes "burglar's tools" and whether certain tools found in his possession were burglar's tools. The test for sufficiency of evidence was set out in State v. Overstreet, 243 N.W.2d 880, 884 (Iowa 1976), as follows:

[T]his court views the evidence in the light most favorable to the state and accepts as established all reasonable inferences tending to support the jury's action. It is necessary to consider only the supporting evidence whether contradicted or not. It is for the fact finder, not us, to resolve questions of fact and determine the credibility of witnesses. Thus a finding of guilt by the trier of fact is binding on this court unless we find it is without substantial support in the record or is clearly against the weight thereof.

In order for defendant to be guilty of possession of burglar's tools, section 708.7 requires evidence that burglar's tools be possessed by defendant with intent to commit the crime of burglary. The term "burglar's tools" was discussed in State v. Knudtson, 195 N.W.2d 698, 700 (Iowa 1972), wherein it was stated: "burglar tools . . . consist of tools which may also have a perfectly legitimate use, such as hammers, screwdrivers, punches, pliers, and prybars." The court stated further that "tools found at the scene of a crime may properly be described as burglar's tools." To establish the fact that instruments or tools with a legitimate purpose constitute "burglar's tools," the evidence presented must reveal "circumstances from which it may be inferred beyond a reasonable doubt the party or parties standing in the position of a possessor intended the use of the article[s] or instrumentalities for the purpose of committing or aiding in the perpetration of a burglary." State v. Van Voltenburg, 260 Iowa 200, 206, 147 N.W.2d 869, 873 (1967).

The two arresting officers testified that they confiscated a prybar, a hammer, and socks from the hands of the suspects at the scene of the crime. The officers both testified that they observed defendant and another man using the prybar to attempt to pry open the bowling alley's doors. We feel this evidence was sufficient to establish that the tools confiscated by the officers from defendant and the other man at the scene of the crime were "burglar's tools" as proscribed by section 708.7, and were possessed with the requisite intent.

Defendant also contends there was insufficient evidence to establish the tools at the scene of the crime were in his possession. This contention is utterly without merit.

The arresting officers each testified that they observed the prybar in the hands of defendant and another man when they discovered them attempting to pry open the doors of the bowling alley. We find substantial evidence defendant had possession of the burglar's tools confiscated at the scene of the crime.

We have considered all issues presented and find no basis for reversal.

**AFFIRMED.**