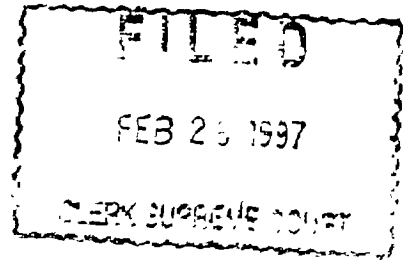


IN THE COURT OF APPEALS OF IOWA

No. 6-795 / 96-507

000510



STATE OF IOWA,

Appellee,

vs.

RANDALL R. WENCK,

Appellant.

Appeal from the Iowa District Court for Calhoun County, Ronald H. Schechtman, Judge.

Defendant appeals from his convictions of third-degree burglary and possession of marijuana. **AFFIRMED.**

Maggi Moss and Patrick Wegman of Parrish, Kruidenier, Moss, Dunn & Montgomery, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, and Cynthia Voorde, County Attorney, for appellee.

Considered by Habhab, C.J., Huitink, and Vogel, JJ.

PER CURIAM

This is an appeal by defendant, Randall Wenck, from his convictions of third-degree burglary, in violation of Iowa Code section 713.6A (1995), and possession of marijuana, in violation of section 124.401(3). He contends there is insufficient evidence to sustain the burglary conviction and he was denied effective assistance of counsel such that his possession conviction should be set aside. We affirm.

During the early morning hours of October 5, 1995, police officers approached Randall Wenck's van, which was parked outside of his grandfather's business. The officers observed what appeared to be a marijuana pipe inside the van and subsequently searched the vehicle. Drug paraphernalia and a small amount of marijuana were found.

Wenck was taken to the police department offices and allowed to make a telephone call from an adjacent city clerk's office. Officers asked him to return to the police offices after his call was complete. Wenck did not return. The officers searched the building for Wenck, but did not find him.

Officer Bobby Rist completed a police report concerning the search of Wenck's van and placed it on the police chief's desk at about 7 a.m. on October 5. This report, some photographs of Wenck's van, an officer's keys, and the original notice of seizure for Wenck's van were seen on the chief's desk some time between 4 and 6 p.m. on October 5. The items were not on the chief's desk later that evening. There was a period of a few hours during the evening of October 5 when no personnel

were in the police department offices. There was, however, a door to the building often left unlocked that would allow entry to the police offices. It became evident to the police the next day that the missing items had been taken.

About three weeks later the police applied for a search warrant for the residence shared by Wenck and his grandfather. In speaking with the local newspaper editor, the police chief learned Wenck had shown the editor a copy of the missing police report about a week before police released it to anyone. The editor stated Wenck claimed to have obtained the report from his attorney. A search warrant issued, and upon its execution, officers found the missing keys in a bureau drawer in Wenck's bedroom. They also found—in a manilla folder labeled "Wenck v. State of Iowa, harassment case"—the missing copy of the police report, the original seizure notice, and a letter that had been on the chief's desk. The missing pictures of Wenck's van were not found. Wenck was charged with possession of marijuana with intent to deliver and with third-degree burglary.

At trial, Wenck admitted the marijuana in the van was his for his personal use. He testified he made his way upstairs from the police station after using the telephone and that he had hidden there until everyone left. He testified he then found an unlocked door allowing him to leave the building. He further testified he came into possession of the stolen property about ten days after being at the police department offices. He claimed he found the papers and the officer's keys under his floor mat after receiving a call from someone who told him to look there. He stated he had a

“pretty good idea” who had placed the items under the mat and that it was someone to whom he had complained about his treatment by police—about a week after the burglary occurred.

Wenck’s motion to dismiss the possession with intent to deliver charge was sustained. The jury found Wenck guilty of possession and of third-degree burglary. Wenck appeals.

I. Sufficiency of the evidence. Wenck contends there is insufficient evidence to support the burglary conviction. Specifically, he complains there is no evidence that he entered the Lake City Police Office after 7 a.m. on October 5 (when the report was placed on the chief’s desk) or that he did so with the specific intent to commit a theft. The State argues that Wenck’s possession of the stolen items, in conjunction with the inconsistencies in his explanations as to how he came into possession of the items, his motive and opportunity to take the items, and his familiarity with the police department premises, is sufficient circumstantial evidence from which the jury could infer Wenck entered the police station with the intent to take the items later found in his bedroom. We agree.

[B]are proof of possession of property recently stolen 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.

State v. Lewis, 242 N.W.2d 711, 723 (Iowa 1976); *see also State v. Hall*, 371 N.W.2d 187, 189 (Iowa App. 1985) (inference of burglary may “arise from possession of recently stolen property when surrounding circumstances are also considered”).

What constitutes “recently stolen property” is generally a fact question. *See State v. Jones*, 289 N.W.2d 597, 599-600 (Iowa 1980); *see also State v. Brightman*, 252 Iowa 1278, 1282-83, 110 N.W.2d 315, 317 (1961) (jury question involved although a five-month interval between burglary and defendant’s possession). The *Brightman* court noted several cases in which the period from a burglary to the discovery of a defendant’s possession was several months, yet found by the jury to be “recent.” *Id.* at 1284, 110 N.W.2d at 318.

“‘Recent’ . . . is not necessarily measured by the number of hours or days or weeks involved. The nature of the articles, and the circumstances of the case are pertinent elements. The length of time is a question to be considered by the jury together with all other factors in the case.

As to the character of the stolen goods it depends to some extent on whether they are readily and easily transferable; light or heavy; easy or hard to identify.”

Jones, 289 N.W.2d at 599 (quoting *Brightman*, 252 Iowa at 1282-83, 110 N.W.2d at 317). Here, the items stolen are “‘of a class of property that . . . is rarely transmitted” such that the jury could have found Wenck was in possession of recently stolen property. *Brightman*, 252 Iowa at 1284, 110 N.W.2d at 318 (quoting *State v. Walker*, 41 Iowa 217, 219 (1875)).

Recent possession of stolen property is evidence of guilt and unless the explanation of the defendant's possession creates a reasonable doubt, a jury is justified in finding the defendant guilty. *Brightman*, 252 Iowa at 1284, 110 N.W.2d at 318. The jury was free to disbelieve Wenck's various explanations of how he came into possession of the stolen items. *See State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). We conclude there was substantial circumstantial evidence from which the jury could find Wenck guilty of third-degree burglary. We affirm the burglary conviction.

II. Ineffective assistance of counsel claim. The trial information pertaining to count I provides: "Said Defendant, on or about the 5th day of October, 1995, in Calhoun County, Iowa, did: Count I - possess a controlled substance with intent to deliver; to wit; less than one (1) ounce of marijuana; *said offense* occurring within 1,000 feet of the real property comprising a school" (Italics added.) At trial, the transcription of the prosecutor's reading of the trial information reads in part as follows: "Said defendant on or about the 5th day of October, 1995, in Calhoun County, Iowa, did, Count I, possess a controlled substance with intent to deliver, to wit, less than one ounce of marijuana, *second offense*, occurring within 1,000 feet of the real property comprising a school" (Italics added.) No objection was made. Wenck now complains his trial counsel provided ineffective assistance in failing to object to the erroneous reading of the trial information.

Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. *Risdal*, 404 N.W.2d at 131. The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Id.* at 131-32.

We conclude Wenck's ineffectiveness claim must fail because he cannot establish he suffered any prejudice. Wenck does not explain how he believes he was prejudiced. The allegedly misread charge of possession with intent to deliver was dismissed before submission to the jury. The jury was asked only whether Wenck was guilty of possession of marijuana. Wenck admitted possessing the marijuana for his own use. Wenck's conviction for possession of marijuana is affirmed.

AFFIRMED.