

IN THE COURT OF APPEALS OF IOWA

No. 9-471 / 98-0501
Filed September 15, 1999

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BUDDY ALLEN PHILLIPS,
Defendant-Appellant.

Appeal from the Iowa District Court for Guthrie County, Gregory A. Hulse,
Judge.

Defendant appeals from his convictions for theft in the second degree and
possession of burglary tools. **AFFIRMED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney
General, and Mary Benton, Guthrie County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

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MAHAN, J.

Buddy Phillips appeals from his convictions for theft in the second degree in violation of Iowa Code sections 714.1(1) and 714.2(2) and possession of burglary tools in violation of section 713.7. He contends the district court erred in denying his motion of judgment of acquittal on the ground of insufficiency of the evidence. He also contends the district court applied the incorrect standard to his motion for new trial. We affirm the convictions and ruling on the motion for judgment of acquittal. We remand to the district court for reconsideration of the motion for new trial under the "weight of the evidence" standard.

On September 13, 1997, at approximately 2:00 a.m., mechanic William Hummel was working at his body shop in Panora. He observed a light-colored Monte Carlo pull into the driveway of the shop. He saw two people in the car then observed it pulling out of the driveway. Hummel then followed the car to various locations. Hummel identified Phillips as the driver of the car and testified the two individuals seemed to be hiding from him by crouching down between automobiles at Panora Service Center. He continued to observe them and eventually turned on his headlights and accelerated. Phillips took off running.

Two police officers and a sheriff's deputy then responded to a dispatch concerning a possible burglary at Panora Service Center. They observed the Monte Carlo with an individual named Eric Espinoza inside. They were unable to locate Phillips but found the vehicle was registered in his name. Inside the vehicle they

observed a scanner, pry bar, screwdriver, vise grips, and a flashlight. The vehicle was impounded. At 7:30 a.m. the same morning, John Meacham of Panora reported his 1985 Ford van was missing. Phillips was eventually apprehended and charged by trial information with theft in the second degree and possession of burglary tools.

Phillips testified at trial and admitted taking Meacham's van. He stated he only intended to use the van to get back to his hometown of Fort Dodge. He drove the van to Fort Dodge and left it in the parking lot behind the Starlite Village motel. The keys were left on top of a deodorizer on a wall in the men's room. Phillips contended he only took the van to get home. He admitted he did not intend to return the van to its owner but stated he did not intend to permanently deprive the owner of his property.

The State presented evidence from Phillips' girlfriend who testified he called her the morning of September 13th and asked her to get rid of the van for him "so the cops wouldn't find it." Phillips pleaded with her several times and told her it was a "top priority" to get rid of the van. She testified Phillips stated "he would have been in trouble" if the police found the van.

The jury found Phillips guilty of theft in the second degree and possession of burglary tools. Phillips appeals.¹

I. JUDGMENT OF ACQUITTAL. We will uphold the trial court's denial of a motion for judgment of acquittal if there is substantial evidence in the record to support the defendant's conviction. *State v. McPhillips*, 580 N.W.2d 748, 752 (Iowa

¹ Phillips appeals both convictions but his arguments focus on the charge of theft in the second degree.

1998). Our review of sufficiency-of-evidence challenges is for correction of errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). The jury's findings of guilt are binding on appeal if supported by substantial evidence. *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998); *State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984). Substantial evidence is such evidence as could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Allen*, 348 N.W.2d at 247.

In deciding whether there is such substantial evidence, we view the record evidence in the light most favorable to the State. *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). A verdict can rest on circumstantial evidence alone. *State v. Torres*, 506 N.W.2d 470, 472 (Iowa App. 1993). However, "[t]he evidence must at least raise a fair inference of guilt as to each essential element of the crime. Evidence which merely raises suspicion, speculation, or conjecture is insufficient." *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992) (citations omitted).

Phillips argues the district court erred in failing to grant his motion for judgment of acquittal on the grounds there was insufficient evidence to show his specific intent to deprive the owner of the van. The State contends there is sufficient evidence to prove such an intent. Specifically, the State points to evidence which establishes Phillips discarded the van in a parking lot behind a motel rather than in a more public place; he made no arrangements to return the van to Meacham; he hid the keys to the van instead of leaving them in the vehicle; he denied any knowledge of the

van when questioned by police; and he gave his girlfriend specific instructions to "get rid" of the van. We agree with the State that the evidence was sufficient to allow the jury to infer Phillips intended to deprive Meacham of the van. The district court did not err in refusing to grant Phillip's motion for judgment of acquittal.

II. MOTION FOR NEW TRIAL. The district court denied Phillips' motion for new trial based on the "sufficiency of the evidence" standard. Phillips and the State agree the district court should have employed the "weight of the evidence" standard as set out in *State v. Ellis*, 578 N.W.2d 655 (Iowa 1998). However, the State contends Phillips did not preserve error on this issue. The State does acknowledge, in the alternative, that remand may be necessary but argues it should be solely limited to the district court's review of the motion in light of the correct standard. We conclude this is the proper remedy. This case shall be remanded to the district court solely for a determination of Phillip's motion for new trial in light of the "weight of the evidence" standard.

In summary, the convictions of the defendant and the district court's ruling on the motion for judgment of acquittal are affirmed and the case is remanded to the district court solely for a determination of the defendant's motion for new trial under the correct standard.

AFFIRMED AND REMANDED.