FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
BRUCE LEE JACOBSON,)
Defendant-Appellant.)

Filed September 27, 1983

3-195
69293

Appeal from Polk District Court, James P. Denato, Judge.

Defendant appeals from his conviction for theft in the second degree in violation of Iowa Code section 714.1(4). AFFIRMED.

Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Roxann M. Ryan, Assistant Attorney General, and Eveadean M. Myers, student legal intern, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel, and Hayden, JJ. Sackett, J., takes no part.

OXBERGER, C.J.

Defendant appeals from his conviction for theft in the second degree in violation of Iowa Code section 714.1(4), asserting that the evidence that he exercised control over stolen goods was insufficient to support the jury's verdict of guilty and that the jury should have been instructed that defendant's presence at the scene of the crime was insufficient to warrant a conviction. We affirm.

I. Sufficiency of the Evidence

Principles governing appellate review of the sufficiency of the evidence were stated in State v. Aldape, 307 N.W.2d 32 (1981).

> In reviewing a motion for a directed verdict based upon insufficiency of the evidence in a criminal case, we view the evidence in a light most favorable to the State. All of the evidence must be considered, and all legitimate inferences that may be deducted therefrom will be accepted. A trial court's refusal to direct a verdict for a defendant will withstand challenge if there is any substantial evidence in the record tending to support the charge. Substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt.

Id. at 39. Jacobson was charged with theft in the second degree. A person commits theft when the person "exercised control over stolen property, knowing such property to have been stolen or having reasonable cause to believe that such property has been stolen unless the person's purpose is to promptly restore it to the owner or to deliver it to an appropriate public officer." See Iowa Code 714(1)(4).

Ms. Wimber testified she saw two men running from an instrument store on University Avenue while carrying guitars. She could see that the door to the instrument store had been broken into. She observed the men running toward a brick apartment building across the street from the instrument store. Ms. Wimber located a policeman and directed him to the area of the alleged crime. The policeman immediately went over to the brick building and later testified that he

observed Jacobson through a window bending over eight to ten guitars inside the brick apartment building. Upon entry in the building, the policeman found a green flight jacket laying on top of the guitars. Jacobson's keys to his apartment and to his car were inside the jacket. When the policeman went upstairs to Jacobson's apartment, he refused to open the door and the policeman had to kick the door in.

We have reviewed the evidence and find that this evidence is substantial enough that a rational trier of fact could be convinced that Jacobson was guilty of the charge of theft in the second degree.

II. Additional Instruction

The general rule is that when a defendant voices no exception to denial of a requested instruction, there is nothing for this court to review. State v. King, 256 N.W.2d 1, 9 (Iowa 1977). Jacobson asked the trial court to submit an additional instruction that "mere presence at or near the scene of the crime is not sufficient to warrant a conviction." The trial court denied the request on the ground that when the jury was told that the State must prove every element of the offense beyond a reasonable doubt, that was sufficient, as it excluded everything else including one's mere presence at the scene of the crime. Defendant's attorney's only response to the court's denial was, "Thank you, Judge."

Jacobson argues that the mere request to submit an instruction is enough to preserve error and cited State v. Law, 306 N.W.2d 756, 758 (Iowa 1981). However, that case concerned instructions of lesser included offenses and therefore can be distinguished from the case at bar. See Iowa R. Crim. P. 6(3). The defendant also cites State v. Jones, 247 N.W.2d 733, 734 (Iowa 1976) as controlling. The statement by defense counsel in that case was found to adequately preserve the claimed error. However, counsel's statements in that case are not even closely analogous to the statement of Jacobson's counsel in this case. We, therefore, find no merit in Jacobson's argument. We agree that without exception, there will be

nothing to review. See State v. Rouse, 290 N.W.2d 911, 914 (Iowa 1980). However, even if error had been preserved in the trial court, we find the denial of the request would still be proper. The court instructed the jury as to the elements of the offense that the State must prove beyond a reasonable doubt. If the jury found Jacobson at the scene of the crime, they would still have to find the other elements to find him guilty. Therefore, we would agree with the trial court that a "mere presence" instruction was unnecessary.

AFFIRMED.