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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed November 29, 1982
vs.	)	127
RICHARD N. JENSEN,	)	2-332/67265
Defendant-Appellant.	)	

Appeal from Page District Court - Keith Burgett, Judge.

Defendant appeals from his conviction of second degree burglary in violation of Iowa Code § 713.3 (1981). AFFIRMED.

Scott Rosenberg, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Michael Jordan, Assistant Attorney General, for plaintiff-appellee.

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

DONIELSON, J. 128

Defendant, Richard Jensen, appeals from his conviction of second degree burglary in violation of Iowa Code § 713.3 (1981). On appeal, defendant asserts that evidence consisting of items of stolen property should have been suppressed since his consent to search for such items was involuntary. He contends that the searching officer obtained defendant's consent by representing that he had a search warrant when, in fact, he did not. He also contends that a second search, conducted shortly after the first, was not consented to at all. We affirm the conviction.

Constitutional questions concerning a valid search and seizure are reviewed de novo. State v. Koop, 314 N.W.2d 384, 387 (Iowa 1982). When there has been a warrantless search and seizure, our de novo review is directed to whether the State met its burden to show the warrantless entry was justified. State v. Brown, 309 N.W.2d 425, 427 (Iowa 1981).

I.

Defendant was suspected of burglary in Shenandoah, Iowa, after he was observed removing various items from a house. There is considerable dispute over what happened on the day the police searched defendant's house, but it is agreed that defendant and a fellow worker were eating lunch at his mother's house when the chief of police approached and knocked on the door. The defendant and this witness assert the chief stated to defendant that he had a search warrant, and was going to search defendant's house. The chief denied he stated he had a search warrant, and asserted the defendant voluntarily consented to the search. The chief and defendant then went to defendant's house, where the chief looked around and saw two items that he believed to be stolen property. The chief of police then asked defendant if he could return at 5:00 that evening with the burglary victim so that she could view the items to see if they were the same items she had reported

as stolen. The defendant replied that the chief could return at 5:00. Later, the police chief returned to defendant's home with the victim. It is unclear whether defendant separately consented to the re-entry into the house. Once there, however, the victim identified the two items as those she had reported stolen, although the appearance of one item had been altered.

The police chief testified that, at this point, he and the defendant went back to the defendant's mother's house where the chief informed them "that [he] was going to hold the chair and the picture frame until [they] had a hearing to find out the true ownership . . . ." The chief of police left the house and called for officers to bring a pickup truck to defendant's house for use in transporting the stolen property.

When the officers met the chief at defendant's house, they entered without obtaining new consent, and seized the items. The defendant was subsequently charged with burglary in the second degree. The defendant's motion to suppress was denied and the items seized were introduced against him at trial and he was convicted as charged. He then instituted this appeal.

II.

The parties are fully in agreement regarding the legal principles which govern this case. A warrantless entry is presumed to be unreasonable and unconstitutional. Brown, 309 N.W.2d at 427. An exception to the search warrant requirement exists where the person whose privacy interests are to be invaded, freely and voluntarily consents to the invasion. Id; State v. Ege, 244 N.W.2d 350, 353 (Iowa 1979). Whether the consent was voluntarily given is a question for the factfinder, but when reviewing the findings on appeal we make an independent evaluation of the totality of the circumstances to determine if the State carried its burden of proving a voluntary consent by a preponderance of the evidence. State v. Folkens, 281 N.W.2d 1, 3 (Iowa 1979). Consent is not free and voluntary

when the person whose interests are invaded merely acquiesces, without objection, to a search by one having apparent authority. State v. Ahern, 227 N.W.2d 164, 166-67 (Iowa 1975).

The narrow issue which we must address is whether defendant voluntarily consented to the police chief's entry and subsequent search and seizure. This issue turns on the credibility of the testifying witnesses. Credibility of witnesses is a matter for the factfinder. State v. Robinson, 288 N.W.2d 337, 341 (Iowa 1980). While we are not bound by the factfinder's determination in this de novo review, we do give it weight. See In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974). The reason for this is obvious; we are not able to observe directly the witnesses' demeanor and thus must give some weight to the finding of the trial court which was in the best position to make these observations.

Here the testimony is in direct conflict. Defendant and his witnesses testified that the police chief told them that he had a search warrant. The police chief testified that he never made this representation. At both the hearing on the motion to suppress and at trial, the chief testified that defendant freely consented to the chief's entry when he asked if he could "come in and look around." During this initial search the chief noticed the two items that had been reported as stolen. He specifically asked defendant if he could return around five o'clock with the person who had reported the theft. The defendant agreed and met the chief and the burglary victim at the front door at approximately five o'clock. The chief's testimony with reference to this second entry is as follows:

> Q. All right. Was there any conversation between yourself and Mr. Jensen at that time?
>
> A. Yeah. I asked him if he was going to let these folks look at those two items that I had looked at earlier.
>
> Q. What did he respond?
>
> A. Yes. He let us in to look at them.

Q. Did he make a statement, though, in response to your inquiry if you could look?

A. I think he told us we could look, yes.

Q. All right. What was Mr. Jensen's physical action then after he told you you could look?

A I think he just stepped aside, and let us in.

After the victim identified the property, the chief told defendant and his mother that two specific items would be taken and kept until a hearing could be held to determine true ownership. The mother responded that she had purchased one of the items. The chief then summoned extra police officers to remove the items to the police station in a pickup truck.

The defendant's version of the facts is different in one major respect; he asserts that the chief asserted that he had a search warrant when he made the initial visit. But the testimony about the alleged search warrant is somewhat conflicting. At the hearing on the motion to suppress, defendant testified that the chief displayed a piece of paper in such a manner as would suggest that the paper was the warrant. He testified that the paper was "[a]bout the size of a piece of typing paper," but was "folded in half." At the trial, however, he characterized the paper differently:

Q. You understand Dick Hunt denies that he ever told you he had a search warrant?

A. Yes.

Q. That he ever showed you a piece of paper?

A. He never showed me a piece of paper.

Q. I thought you told me he showed you a piece of paper?

A He had one in his hand. He never let me have it.

Q. Did he tell you that was the search warrant?

A No, he didn't.

> Q. He didn't say he had a search warrant, raising his hand to indicate this piece of paper was it?
>
> A. No, he didn't. He was just carrying it like it was a little pad or something.

The trial court concluded that the search and seizure was voluntary. Having reviewed the entire record, we agree. We believe the chief of police did not represent that he had a search warrant and that defendant voluntarily allowed him to search for the items.

We believe the seizure was also justified. The officer told him the property would be taken during the second legitimate consent search. The property was seized shortly thereafter. The consent to do so was implicit in this series of events. Moreover, in State v. Don, 318 N.W.2d 801, 804 (Iowa 1982), the court noted that "[w]hen officers find evidence they are lawfully searching for, they are entitled to seize it."

Having found defendant's contentions to be without merit, we affirm his conviction.

AFFIRMED.