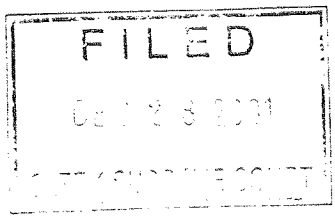
IN THE COURT OF APPEALS OF IOWA

No. 1-431 / 00-1014
Filed December 28, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAROLD DENNIS ALLEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Dickinson County, Frank B. Nelson, Judge.

On appeal from his conviction for third-degree burglary, defendant contends: (1) the State did not produce substantial evidence to prove he was guilty beyond a reasonable doubt; (2) the court erred in accepting his admissions of prior convictions without first engaging him in a colloquy informing him of the consequences of those admissions; and (3) the court erred in denying his motion to suppress. **AFFIRMED.**

James H. Pickner, Hawarden, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, and Edward Bjornstad, County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Hecht, JJ.

000551

SACKETT, C.J.

Defendant-appellant Darold Dennis Allen was found guilty of third-degree burglary in violation of Iowa Code sections 713.1 and 713.6A (1999) and was determined to be a habitual offender under Iowa Code section 902.8 (1999). Defendant contends on appeal that (1) the district court erred in denying his motion to suppress evidence; (2) there is not substantial evidence supporting his burglary conviction; and (3) the district court violated his right to due process in accepting his admission that he had prior convictions without first making a determination that he understood the consequences of his admissions. We affirm.

At about noon on January 21, 2000, a sheriff's deputy was called to investigate an alleged burglary at a home on East Okoboji Lake in rural Dickinson County. The report came from Fred Schmidt, who owned an alarm system company that serviced the area. Schmidt had installed an alarm at the David Smidt home approximately six months earlier. Schmidt arrived to service the alarm and found it had gone off. In checking the house he found change strewn in one bedroom of the house, and a broken window and large rock in a second bedroom. Schmidt reported the incident, and a Dickinson County deputy sheriff came to investigate. It had snowed the night before, and Schmidt and the deputy followed tracks from the Smidt home to a second lake house owned by Perry Husman. The Husman house had a broken window and an open sliding-glass door. A gun safe inside had been pried open, and other parts of the house were ransacked.

000552

Schmidt and the deputy then followed the tracks across the lake to Arthur Heights, turned north to East Okoboji Beach, east to Bob Street, and north up Marttin Drive. The footprints led to an unattached garage near the Jonathon Davis home. Defendant lived in part of the garage.

A search warrant was issued. During his search of the garage, the deputy took a pair of boots that the State later claimed matched the characteristics of the boots that made the tracks from the Smidt home to the Husman home and then to the garage. The deputy later testified that he did not know if the boots belonged to the defendant or to Davis, and that he had made no attempt to find out. The officers also found an art cell from the movie *Cool World*[1], a teddy bear, a toy John Deere combine and a racing car. Husman was to testify the cell was worth $5,000 to $10,000 and the teddy bear, toy combine and car belonged to his children.

Defendant was charged with second-degree burglary of both the Smidt and the Husman homes. The jury found him not guilty of burglary of the Husman home and guilty of second-degree burglary of the Smidt home.

Defendant contends his motion to suppress the boots should have been sustained. The warrant authorized a search for a "gun and an undetermined amount of money." In the process of executing the warrant, the deputy took a pair of boots sitting in the single-stall garage owned by Davis that was attached to the garage apartment defendant rented from Davis. A door separated defendant's apartment from the garage. The deputy testified the boots were seized pursuant to the warrant.

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[1] The cell had disappeared by trial time.

The district court found the warrant did not authorize the officer to search for the boots and further found that at the time of the search defendant was in custody and the scene was under control, so no exigent circumstances justified expanding the scope of the search or the seizure. The district court allowed the boots in evidence under the plain view doctrine.

The State admits the search warrant was quite specific and did not contain any general classes of items. The State concedes the warrant did not include any language either specific or general that would permit officers to seize a pair of boots. The State advances that the doctrine of plain view adopted by the district court was correct and that the district court should be affirmed on this basis.

All searches and seizures must be conducted pursuant to a search warrant issued on probable cause unless circumstances are shown to excuse compliance with that constitutional restriction. *State v. Jackson*, 210 N.W.2d 437 (Iowa 1973); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 2031, 2032, 29 L. Ed. 2d 564, 576 (1971). Among the recognized exceptions to this rule is the plain view doctrine. *State v. Schrier*, 283 N.W.2d 338, 342 (Iowa 1979). This is the exception the State contends supports its position in this case.

In the absence of a warrant, the burden is on the State to demonstrate that the actions were lawful. *State v. Ege*, 274 N.W.2d 350, 353 (Iowa 1979). In order to support a seizure under the plain view doctrine, the State must show the intrusion of the police was lawful, and that the incriminating nature of the object

was immediately apparent. *State v. Chrisman*, 514 N.W.2d 57, 60 (Iowa 1994) (citation omitted).

Our review of this constitutional claim is de novo. *State v. Roth*, 305 N.W.2d 501, 504 (Iowa 1981).

The deputy had a right to be in the garage, as he was there for the purpose of executing a search warrant. The boots were in plain view of the deputy. The possible incriminating nature of the boots was apparent to the deputy because the boots were at the end of the footprint trail followed by the deputy. The State has sustained its burden of proving the legality of the seizure. *See State v. Oliver*, 341 N.W.2d 25, 32-33 (Iowa 1983). We affirm the district court's denial of the motion to suppress.

Defendant next contends that there was not substantial evidence to support a finding he was guilty beyond a reasonable doubt of burglary in the third degree of the Smidt home.

The standard of review in challenging the sufficiency of the evidence is well established. *State v. Dible*, 538 N.W.2d 267, 270 (Iowa 1995) (citation omitted). We will uphold a verdict where there is substantial evidence in the record tending to support the charge. *Id.* Upon review of the sufficiency of evidence to support the verdict, we view the evidence in the light most favorable to the verdict, and we accept as established all reasonable inferences tending to support it. *Id.* We will construe findings to uphold, rather than defeat, the judgment. *Id.* Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." *Id.; citing State v. Hamilton*, 309 N.W.2d

471, 479 (Iowa 1981). It is necessary to consider all the evidence in the record and not just the evidence supporting the verdict to determine whether there is substantial evidence to support the charge. *Dible*, 538 N.W.2d at 270, citing *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984) (quoting *State v. Blair*, 347 N.W.2d 416, 419 (Iowa 1984)). Substantial evidence means evidence which would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984).

The State contends that defendant's guilt is well-established by the fact that he had possession of stolen property from both burglaries hours after they occurred, and he alone had access to the garage apartment and joint access to the garage.

Defendant argues that while there was expert testimony that tracks photographed at the crime scene were consistent with the design tread on the boots, the expert admitted that the quality of the pictures did not permit him to identify any individual characteristics of the boots such as worn heels or nicks in the tread. The expert could not estimate how many other boots could have made the same prints and admitted they could have been made by other boots. The boots were found in the garage, not in defendant's apartment.

Defendant further points out, and the State admits, that the State did not present definitive evidence establishing that defendant was wearing the boots that made the tracks in the snow. He argues also that the boots were kept in a garage accessible to defendant but owned and used by Davis to store property and keep his cars. Defendant further advances that Davis was charged with receipt of stolen property and possession of burglary tools at the time of

defendant's arrest and that Davis owned a collectibles and antique store. Defendant noted Davis said that items found in the garage which were determined stolen were items Davis had actually purchased.[2]

The drill was the only item stolen from Smidt, the charge on which defendant was convicted. The drill was a standard drill. Smidt identified it as coming from his house, but did not explain how he identified the drill from others sold. The drill was found by Davis and brought to law enforcement. There is no direct testimony as to where the drill was found, although the deputy believed it was found in the garage.

The crux of the State's case against defendant revolves around the following: (1) tracks led to the area where defendant lived; (2) boots never identified as his were in an area where he had access, although he had no ownership and use of that area; and (3) the stolen drill was turned in by Davis without evidence that it was ever in defendant's possession. We agree with defendant that this evidence alone is not sufficient to support his conviction.

The State argues, however, that even though the defendant was not convicted of the Husman burglary, we should consider as support for the conviction the fact that items from the Husman house were in defendant's apartment. We agree. Although items found in defendant's apartment were from the Husman house, and the defendant was only convicted of the Smidt burglary, we find that the tracks linking the two homes sufficiently link the incidents at each

[2] At the time of trial Davis was charged with two counts of possession of stolen property, possession of a controlled substance and possession of burglary tools, which were class "D" felonies. Additionally he was charged with two charges that were less serious. Davis had met with the county attorney the night before trial. Davis indicated that he was cooperating and anticipated the [State] would take into consideration what had happened in this case.

home to justify our considering the evidence gathered from both homes in our review of the individual Smidt burglary conviction. We find the evidence of the tracks in the snow leading away from the Smidt house, to the Husman house, and ultimately to defendant's residence, and the evidence of Smidt's stolen drill, together with the evidence of the stolen items from the Husman house, is sufficient to support the Smidt home burglary conviction.

Defendant next contends that the district court violated his right to due process in accepting defendant's admission of prior convictions without first determining that he understood the consequences of admitting his criminal past.

This argument was rejected in *State v. McBride*, 625 N.W.2d 372, 374-75 (Iowa Ct. App. 2001). We decline defendant's invitation to overrule *McBride* and affirm on this issue.

AFFIRMED.

000553