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IN THE COURT OF APPEALS OF IOWA

IN THE INTEREST OF

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Filed September 9, 1977

WAYNE POWELL,

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207
3-59957

A child.

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Appeal from Scott Juvenile Court - Don A. Petruccelli, Judge.

Appeal from juvenile delinquency adjudication pursuant to Chapter 232 questioning identification and sufficiency of evidence to prove commission of crime beyond a reasonable doubt. - Affirmed.

Dennis D. Jasper, of Bettendorf, for Appellant.

Richard C. Turner, Attorney General of Iowa, and Stephen C. Robinson, Special Assistant Attorney General, for Appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Appellant, Wayne Powell, appeals an adverse adjudicatory order finding him a delinquent child pursuant to §232.2(12)(a), The Code. A petition was filed alleging Powell did maliciously and feloniously remove, break, unfasten or injure a part of a motor vehicle in violation of §714.11, The Code. An adjudicatory hearing was held in which the court found Powell had committed the offense of malicious injury to a motor vehicle. At the dispositional hearing, Powell was committed to the Director of the Bureau of Family and Children's Services, Iowa Department of Social Services. Section 232.34, The Code. Powell subsequently filed this appeal.

Our review is de novo. In *Interest of Thompson*, 241 N.W.2d 2, 4 (Iowa 1976); In *Interest of Meek*, 236 N.W.2d 284, 289 (Iowa 1975); Section 232.58, The Code. However, we do give weight to the trial court's findings, but are not bound by them. *Meek*, supra; Rule 14(f)(7), Rules of Appellate Procedure.

Appellant initially attacks the identification procedures used by the police officers in connection with the principal witness, Tina Gordon, but does not argue it separately on appeal. He contends that the identification procedures used were so unnecessarily suggestive as to be conducive to irreparable mistaken identification. See *State v. Wisniewski*, 171 N.W.2d 882, 884 (Iowa 1969); See also *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). However, assuming there was an illegal identification procedure used prior to trial, the in-court identification is admissible if the State proves by clear and convincing evidence that the in-court identification had an independent origin. *State v. Houston*, 209 N.W.2d 42, 44 (Iowa 1973). See also *State v. Feddersen*, 230 N.W.2d 510, 513 (Iowa 1975); *Wisniewski*, supra.

In the instant case, the witness, Tina Gordon, stated she was able to independently identify Powell in court apart from any confrontation at the police station. Powell's attorney cross-examined her on voir dire as to this ability. Nothing in the record indicates that Gordon was unable to independently identify Powell. In addition, we have serious doubts whether this error is preserved for appeal as defense counsel did not object. See *State v. Bash*, 214 N.W.2d 219 (Iowa 1974). Even if preserved, we find no merit in this assignment of error.

The principal issue on appeal is whether the State proved beyond a reasonable doubt that Powell committed the crime of malicious injury to a motor vehicle. When a delinquency charge, as here, is based upon an alleged public offense, due process requires that proof be beyond a reasonable doubt. **Thompson**, *supra*. See also *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

Direct evidence is not necessary to prove the commission by defendant of the crime charged. It may be proved by circumstantial evidence alone, but the facts proved must be consistent not only with the guilt of the accused but they must also be inconsistent with any rational theory of defendant's innocence. *State v. Ampey*, 210 N.W.2d 433, 434 (Iowa 1973). Moreover, one cannot be convicted of a crime upon a theory of aiding and abetting unless there is sufficient evidence to show he assented to or lent countenance and approval to the criminal act. *State v. Barnes*, 204 N.W.2d 827, 828 (Iowa 1972). Mere physical presence at the scene of the crime does not prove aiding and abetting. **Barnes**, *supra*. However, a defendant's participation as an aiding and abetting accomplice may be proved by circumstantial evidence. Circumstances which may be considered include those surrounding the act and defendant's subsequent conduct. **State v. Barnes**, *supra* at 828.

From a review of the entire record, we find there is sufficient evidence to establish Powell's participation in the offense charged. A witness identified Powell as one of two youths who were present at the scene. Powell was identified as the youth who took off running with a screwdriver in hand. A coathanger and broken auto glass were found next to where the youths were standing when discovered by Gordon.

Accordingly, the findings of the trial court and the adjudication of delinquency as well as the disposition of the case is affirmed.

Affirmed.