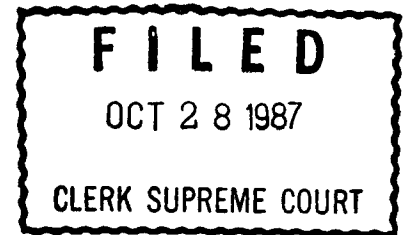


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed October 28, 1987

270

vs.

)

JOSEPH THOMAS HARTWIG,

)

7-343
86-1698

Defendant-Appellant.

)

Appeal from the Iowa District Court for Benton County (No. CR 2567),
William R. Eads, Judge.

The defendant appeals from judgment entered upon a jury verdict finding him guilty of burglary in the second degree, operating a motor vehicle without the owner's consent, and driving while his driver's license was suspended or revoked, claiming the trial court erred in overruling his motion for judgment of acquittal and giving instruction No. 18 allowing the jury to draw an inference of guilt for the crime of burglary in the second degree if he was found to be in possession of recently-stolen property. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Michael J. Laughlin, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Mark J. Zbieroski, Assistant Attorney General; and Thomas E. Noonan, County Attorney, for plaintiff-appellee.

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

PER CURIAM**271**

On July 31, 1986, the appellant, Joseph Thomas Hartwig, was charged by trial information with second-degree burglary, see Iowa Code §§ 713.1, 713.5 (1985), operating a motor vehicle without the owner's consent, see Iowa Code § 714.7 (1985), and driving while license suspended or revoked, see Iowa Code § 321.218 (1985). Trial commenced on September 22, 1986, and, one day later, the jury returned verdicts finding Hartwig guilty as charged. Hartwig's amended motion for new trial was denied and he was sentenced to concurrent indeterminate terms not to exceed ten years on the burglary conviction and two years on the operating without owner's consent conviction. He received a suspended sentence on the operating while license revoked conviction. This appeal, which deals exclusively with the burglary conviction, followed. Our review is limited to the correction of legal errors. Iowa R. App. P. 4.

I.

Hartwig maintains the district court erred in giving the following jury instruction:

If you find that the State has proven beyond a reasonable doubt each and all of the following facts, then you may, but are not required to, infer that the Defendant broke and entered the Roundtable Tavern:

(a) That the property claimed to have been stolen from the Roundtable Tavern was, in fact, stolen at the time such business was burglarized.

(b) That the Defendant had unexplained possession of that property.

(c) That Defendant's possession of that property was recent.

What is recent possession of property cannot be precisely determined. The nature of the property, its ease of transfer and all other facts and circumstances shown are to be considered as bearing on whether the interval between the time of the alleged burglary and the Defendant's alleged possession was so short as to render it reasonably certain that there could have been no intermediate change of possession.

It is important that you keep in mind that it is your exclusive province as jurors to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits you to draw from possession of recently stolen property, and you are not required to make this inference. If any possession a Defendant may have had of recently stolen property is consistent with innocence, or if you entertain reasonable doubt of guilt, then you must acquit the Defendant.

Hartwig's allegation of error is premised upon his claim that the evidence fails to demonstrate he was, in fact, in possession of stolen property. The most the evidence shows, according to Hartwig, is that he was in possession of certain fungible items—cigarettes and change—similar to those stolen. Accordingly, he concludes, no factual basis existed in support of the instruction.

We disagree. The cases clearly refuse to erect the type of barrier Hartwig would have us construct. The rule in cases of this type is that evidence tending to show a defendant's

possession of goods of the same kind as the general class from which the taking was done is receivable, even though the specific quantity or any quantity of the general mass cannot be identified or discovered or shown to be missing.

State v. Lewis, 242 N.W.2d 711, 725 (Iowa 1976); State v. Gray, 239 N.W.2d 584, 586 (Iowa 1976); State v. Davis, 229 N.W.2d 249, 251-52 (Iowa 1975). Such evidence is receivable even though not positively identified as that taken. See Davis, 229 N.W.2d at 251. A rational juror could reasonably conclude that such items were those stolen. See Lewis, 242 N.W.2d at 725. Accordingly, a factual basis existed for the giving of the instruction and Hartwig's first claim must fail.

II.

Hartwig contends the district court erred in refusing to grant his motions for judgment of acquittal made at the close of the State's case and again at the close of all evidence. He maintains the record evidence fails to establish that he committed the burglary. The principles applicable to our review of

such a challenge were stated as follows in State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985):

When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the State, including all legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. It is necessary to consider all of the evidence and not just the evidence supporting the verdict. A jury verdict is binding upon this court and will be upheld unless the record lacks substantial evidence to support the charge. Substantial evidence means evidence which would convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt.

See State v. Blair, 347 N.W.2d 416, 419 (Iowa 1984).

At the very least, our cases allow an inference of burglary to arise from the possession of recently-stolen property when surrounding circumstances are also considered. Hall, 371 N.W.2d at 189. We have already held, in part I, supra, that a rational juror could conclude the property possessed by Hartwig was taken during the offense at issue. In addition, the record contains evidence from which a rational juror could conclude that Hartwig, a resident of Dysart, Iowa, was in Garrison, Iowa, during the early morning hours of July 18, 1986, the time during which the offense occurred; that he had no cigarettes prior to going to Garrison, that he knew of no place to buy cigarettes during the hours he was there; that when arrested at 8:45 a.m. the next day Hartwig possessed a quantity of cigarettes; that Hartwig lied to the police about his whereabouts that morning; that shortly after his arrest a sizeable quantity of cigarettes was found hidden at his father's residence; that Hartwig admitted to hiding the cigarettes; and that the nine brands of cigarettes found corresponded to the nine brands stolen. We think the record supports the jury's verdict, see Hall, 371 N.W.2d at 190; State v. Schrier, 300 N.W.2d 305, 309 (Iowa 1981), and we do not, accordingly, disturb it.

AFFIRMED.