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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Appellee,)

Filed April 15, 1977

v.)

MICHAEL D. CURTIS,)

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59602

Appellant.)

Appeal from Jefferson District Court - L. R. Carson, Judge.

Appeal from conviction of breaking and entering and
resulting sentence. Affirmed.

Gene W. Glenn, of Ottumwa, for appellant.

Richard C. Turner, Attorney General, Richard H. Doyle IV,
Assistant Attorney General, and Sidney E. Drake, Appanoose
County Attorney, for appellee.

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

ALLBEE, C.J.

Defendant, Michael Curtis, appeals his conviction of breaking and entering Grismore's Jewelry Store in Centerville, Iowa, and the resulting sentence of ten years in the penitentiary. Defendant challenges the sufficiency of the evidence to support the conviction; the propriety of submitting instruction seven - possession of recently stolen property; trial court's failure to sua sponte instruct the jury on the necessity of corroboration of an accomplice; and the overruling of his motion for a new trial. Finding no reversible error, we affirm. Errors are discussed in order of assignment.

I. Sufficiency of the evidence.

Viewing the evidence in light most favorable to the State, a jury could have found that between the hours of 9:00 P.M. and 8:00 A.M. on February 25 and 26, 1975, the glass in the front door of Grismore's Jewelry Store in Centerville was partially broken and numerous watches, rings, money and other goods were stolen. Investigating officers at the scene discovered what appeared to be blood on the broken glass. No fingerprints of any suspect were discovered although the shop was dusted. The owners of the business estimated the loss in excess of \$14,000, very little of which was covered by insurance.

Mary Jane Sumpter, a paramour of defendant, testified that on the same night as the break-in, defendant arrived at her home between 12:30 A.M. and 1:00 A.M. carrying a pillow case. Defendant emptied the contents of the pillow case onto the floor revealing numerous jewelry and watches with tags that said "Grismore's". The defendant stated: "I finally did it, Babe." Ms. Sumpter also noticed a fresh scratch on defendant's right hand. After obtaining permission to leave the pillow case at the Sumpter residence, defendant left. Ms. Sumpter's

sister, Rebecca Brookhart, arrived shortly thereafter and also examined the contents of the bag. Ms. Sumpter at that time selected some items to keep for her own use. Ms. Brookhart also selected a gold watch for her father. Defendant picked up the remaining merchandise the next morning.

After an elapse of several months and two intervening sales, Ms. Brookhart's - Grismore's gold watch ended up in the possession of George Stewart who took it to Grismore's to have it cleaned. The watch was identified which ultimately led to the arrest of defendant.

Defendant challenges the sufficiency of this evidence, especially in light of State v. Lewis, 242 N.W.2d 711 (Iowa 1976). Under our standard of review amply set out by State v. Overstreet, 243 N.W.2d 880, 883-884 (Iowa 1976), the case was properly submitted to the jury.

Although there was no direct evidence of defendant's guilt, the circumstantial evidence was strong, if the State's witnesses are believed. Defendant was in possession of recently stolen property from Grismore's, justifying the inference that defendant committed the breaking and entering. See State v. Mays, 204 N.W.2d 862, 865 (Iowa 1973). We are mindful that this inference can permissibly be drawn only where the record discloses surrounding circumstances of defendant's possession of the stolen property such that ". . . the evidence warrants a finding beyond a reasonable doubt of the presumed fact defendant committed the breaking and entering from the proved fact he possessed recently stolen property." State v. Lewis, supra at 723. We believe the surrounding circumstances as disclosed here justifies the inference. Ample evidence was presented from which it could be inferred that the breaking and entering and the theft of the property occurred at the same time.

See *State v. Mays*, supra. Defendant's possession of the stolen property shortly after the break-in occurred; see *State v. Lewis*, supra; the fresh scratch on defendant's right hand coupled with the discovery of a substance which appeared to be blood on some broken glass at the break-in; and defendant's tacit admission of guilt to Ms. Sumpter is sufficient knowledge of the surrounding circumstances of defendant's possession of the stolen property and also of the breaking and entering to justify the inference that he committed the crime. Trial court did not err in overruling defendant's motion for directed verdict.

II. Instruction on inference of guilt arising from possession of recently stolen property.

Defendant challenges instruction seven on recently stolen property as not complying with guidelines established in *State v. Lewis*, 242 N.W.2d 711, 723 (Iowa 1976). Yet all the claimed errors in the instruction were not presented to trial court either by objection or in the motion for a new trial. The only defect in instruction seven asserted in the district court was that the recently stolen property inference was inapplicable to a charge of breaking and entering. *But see*, *State v. Mays*, 204 N.W.2d 862, 865 (Iowa 1973). Consequently, the claimed errors are not preserved for review. *State v. Lewis*, supra at 715-716; *Dutcher v. Lewis*, 221 N.W.2d 755, 759 (Iowa 1974).

III. Failure to give accomplice instruction.

Defendant argues trial court's failure to sua sponte instruct on the necessity of corroborating evidence to Ms. Sumpter's and Ms. Brookhart's testimony was reversible error since they were accomplices as a matter of law. *See State v. Jochims*, 241 N.W.2d 25, 27-28 (Iowa 1976); *State v. Anderson*, 240 Iowa 1090, 1096, 38 N.W.2d 662, 666 (1949).

The test whether a person is an accomplice is well established in Iowa. *See* State v. Bizzett, 212 N.W.2d 466, 468 (Iowa 1973). In order to be an accomplice, a witness must be able to be tried and convicted of the same crime. State v. Sallis, 238 N.W.2d 799, 802 (Iowa 1976). Defendant's argument is based on a faulty premise since our Supreme Court has held that witnesses who receive and conceal stolen property are not accomplices to a person who has committed the break-in. State v. Smith, 248 Iowa 603, 607, 81 N.W.2d 444 (1957); *see* State v. Grindle, 215 N.W.2d 268, 271 (Iowa 1974). No evidence was presented that either Ms. Sumpster or Ms. Brookhart participated in the break-in at Grismore's. Trial court did not err in not sua sponte instructing on accomplice testimony.

IV. Motion for new trial.

Lastly, defendant urges that trial court erred in overruling his motion for a new trial containing multifarious grounds. Many of the motion's allegations of error concern matters already treated in this opinion. Additionally, the motion alleged defendant was denied a fair trial in that one Gerald Banks, a Centerville police officer, was allowed to sit at the State's counsel table during the trial. The alleged error has neither been argued in brief nor supported with any authority; consequently, we decline to review it. *See* State v. Potts, 240 N.W.2d 654, 656 (Iowa 1976). Trial court did not abuse its broad discretion in overruling the motion. State v. Sheffey, 234 N.W.2d 92, 98 (Iowa 1975).

All errors have been examined and found to lack merit. Defendant's conviction and resulting sentence hereby are affirmed.

DONIELSON, SNELL and CARTER, JJ., concur; OXBERGER, J., dissents.

Oxberger, J. (dissenting)

I agree the *Lewis* case controls our analysis of the permissibility of inferring from the alleged possession of recently stolen goods that Curtis committed the breaking and entering. However, *Lewis*, 242 N.W.2d at 723 requires:

" . . . there must be evidence in the record relating to the surrounding circumstances for the jury to consider in determining whether the evidence warrants a finding beyond a reasonable doubt of the presumed fact defendant committed *the breaking and entering* (emphasis added) from the proved fact he possessed recently stolen property."

In *Lewis* the defendant was charged with breaking and entering a service station in Ellsworth. Shortly after the time this crime occurred, the *Lewis* defendant was observed by the police in a nearby community, under suspicious circumstances sneaking from the scene of a tampered Pepsi Cola vending machine. His vehicle's headlights were not illuminated despite the fact it was 4:00 a.m. The police, after stopping the vehicle, found two crowbars with blue paint marks similar to the blue on the Pepsi machine, as well as what appeared to be a money bag protruding from under the front seat. The law permits the admission of burglary tools as bearing on the intent to burglarize. Further, the police found in the car items identical to those stolen from the first service station in a box marked "Dalby Serv.".

The key point is that all the circumstantial evidence in the *Lewis* case pointed to the defendant being a burglar. All the evidence came to police attention and possession within hours of the burglary.

In this case Curtis is connected to the burglary, if at all, only by the statement, allegedly made to Ms. Sumpter, "I finally did it", and the fact that she claims to have observed a fresh scratch on his right hand. The police had

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observed what appeared to be blood on the broken glass at the scene of the burglary.

The statement "I finally did it" could mean many things but, at worst, it does not indicate guilt of burglary as opposed to guilt of receiving and concealing. A scratch on the hand does not have the hallmark of a burglar. There is no sufficient circumstantial evidence in this case to meet the *Lewis* test.

Furthermore, the evidence in this case does not meet any due process standard. Months after the burglary occurred the stolen property was traced to Ms. Sumpter. Faced with the prospect of criminal charges, she admitted her culpability in that she kept some items for her own use and aided her sister, Ms. Brookhart, in disposing of a gold watch. She then told the police that Curtis brought the stolen merchandise to her house. She did not implicate Curtis in the burglary. This is most important. Even assuming she is not an accomplice as a matter of law, she did not testify to any facts that connected Curtis to the burglary. The only evidence connecting Curtis to the burglary is the *inference* from Ms. Sumpter's testimony regarding the recently stolen merchandise. *Lewis* constrains us to hold bare proof of possession of recently stolen property does not permit, as a matter of law, the jury to conclude Curtis committed the breakin. 242 N.W.2d at 723.

Although there may be adequate evidence to convict Curtis of receiving and concealing stolen property, I respectfully submit it is not sufficient evidence to convict him of breaking and entering, the crime charged.