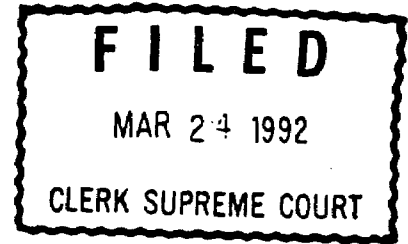


IN THE COURT OF APPEALS OF IOWA

No. 1-599 / 90-1683



STATE OF IOWA,

Appellee,

vs.

JOHN BARRY DAVIS,

Appellant.

Appeal from the Iowa District Court for Scott County,
J.L. Burns, Judge.

Defendant appeals the judgment entered upon his
convictions for burglary in the second degree, and theft in
the second degree. **REVERSED.**

Linda Del Gallo, State Appellate Defender, and Andi S.
Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Roxann M. Ryan,
Assistant Attorney General, William E. Davis, County
Attorney, and Joe Grubisich, Assistant County Attorney, for
appellee.

Considered by Donielson, P.J., and Schlegel and
Sackett, JJ.

SACKETT, J.

Defendant-appellant John Barry Davis appeals his conviction for burglary in the second degree in violation of Iowa Code sections 713.1 and 713.5 (1989), and theft in the second degree in violation of Iowa Code sections 714.1(1) and 714.2(2). The defendant contends there is not sufficient evidence to support his conviction, and the trial court erred in allowing into evidence over his foundational objection an exhibit allegedly establishing the value of copper wire the defendant was charged with stealing. We find there is not sufficient evidence to support defendant's conviction. We reverse.

Defendant was charged and convicted, following a jury trial, of taking copper wire from the J.I. Case plant in Bettendorf. The evidence in the light most favorable to the verdict, showed early in the morning on January 31, 1990, the Bettendorf Police Department received a report two people had parked a pickup about one hundred yards north of and across the railroad tracks from the J.I. Case plant. It was also reported two white men wearing dark clothing walked toward the plant carrying flashlights and bolt cutters. Officers from the department went to where the pickup was parked and watched for four hours. The pickup belonged to the defendant's girlfriend. The officers entered the plant and investigated for an hour. They did not discover anything suspicious. They left the plant and continued surveillance.

Later, one officer saw two white men walk from the plant. They made several trips to an area north of the plant and on one trip were dragging something. The officer asked other officers to come to the area. A half an hour later the defendant and a companion were arrested near the location where the pickup was parked. There was testimony defendant and his companion were the only people the officers observed in the area. When the defendant was arrested, he was wearing dark clothing. There was dirt on his hands and clothing. There was testimony there was dirt in the Case plant.

There was no testimony identifying the defendant as a person reported leaving the pickup and heading toward the plant or as a person leaving the plant. North of the railroad tracks, the officers found a flashlight. Outside the plant near a window, the officers found 374 feet of one-inch copper cable cut in strips 49 to 64 feet in length.

Footprints were found near the window where the copper cable was found. The footprints were never connected with the defendant or his companion.

Inside the plant, the officers found a pair of bolt cutters, a hacksaw and a come along. There was also 540 feet of copper cable inside the building within 30 feet of the window. The wire had not been there when the officers were inside the plant earlier..

The officers took 914 feet of cable from inside and outside the plant. A small section of cable was entered into evidence. An officer testified the remaining cable was loaded in a city vehicle and taken to the Alter Company to be weighed.

The defendant contends there is not sufficient evidence to support his conviction. The defendant argues the evidence is not sufficient to establish he was a perpetrator of a burglary or theft. He points out there was not evidence he actively participated in the crime, he was never seen entering the plant, and he was not identified as one of the persons dragging an object north of the plant.

He points out there were no fingerprints taken. That there was no attempt to identify the footprints as his. He says the presence of dirt on his body and clothing was certainly not sufficient to place him in the plant.

In reviewing this issue, we review all the evidence in the light most favorable to the verdict to decide whether the record contains substantial evidence to support a guilty verdict, such that a rational juror could find guilt beyond a reasonable doubt. State v. Robinson, 288 N.W.2d 337, 341 (Iowa 1990). In determining the sufficiency of evidence to support a guilty verdict, we consider the evidence in the light most favorable to the State. State v. Klindt, 389 N.W.2d 670, 676 (Iowa 1986); State v. Blair;

347 N.W.2d 416, 418-19 (Iowa 1984); State v. Origer, 418 N.W.2d 368, 369 (Iowa App. 1987). Substantial evidence means evidence that would convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. Blair, 347 N.W.2d at 419.

All the evidence connecting the defendant to the crime was circumstantial. Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). Whether the evidence is direct or circumstantial, however, it must raise a fair inference of guilt; it must do more than create speculation, suspicion, or conjecture. Blair, 347 N.W.2d at 421; Origer, 418 N.W.2d at 370. The defendant was in the area of the crime at 5:25 a.m. The State argues (1) defendant's presence at the scene is important because his arrest occurred at 5:25 a.m., at a time few people were on the street, (2) two white men in dark clothing were seen near the scene, and defendant and his companion were both white men in dark clothing, (3) defendant was dirty and the inside of the building was dirty, and (4) the pickup which had been parked for some time in the area belonged to defendant's girlfriend. There is no question the evidence creates a suspicion or speculation defendant was involved. However, the question is whether the evidence raises a fair inference of guilt. Origer, 418 N.W.2d at 370. We disregard in our consideration the footprints found near the copper and the dirt on defendant's clothing. There was

no evidence to tie the defendant's foot gear to the footprints. The footprints, therefore, are not evidence connecting the defendant to the crime. The dirt on defendant's clothing and hands was never identified as having any of the characteristics of dirt in the plant. Dirt is so commonplace, there is no basis to assume if a person is dirty he or she got dirty in a certain place. Because there is no evidence identifying the type of dirt on defendant's clothing as being in some way similar to dirt in the plant, we disregard evidence of defendant's dirty clothing in our consideration.

The defendant next contends the trial court erred in admitting evidence of the value of the copper wire allegedly taken. The State sought to establish the value of the copper wire taken through the testimony of a caretaker of the property. The police notified the caretaker of the theft, and a police officer testified the wire taken was taken to the Alter Company to be weighed. She said she received a copy of a weight ticket from Alter Scrap showing the copper wire weighed 1,540 pounds, and Alter Scrap paid her company \$616 for the scrap copper wire. The defendant claims the evidence was not relevant. The defendant contended the testimony of the caretaker about the weight and value of the wire did not establish an issue in the case because there was no showing the wire weighed and valued was the same copper wire that was taken

from the Case plant. The caretaker was not able to testify she had seen the wire. She did not personally know if the wire taken to Alter Scrip was wire from the plant.

The defendant also argues the testimony was prejudicial because it established the value of copper wire and was the only value evidence offered by the State, and without it he could not have been convicted of theft in the second degree. We have reversed on other grounds and need not address this argument.

REVERSED.

Schlegel, J., concurs; Donielson, P.J., dissents.

DONIELSON, P.J. (dissenting)

I respectfully dissent. I find neither of the defendant's assignments of error persuasive and would affirm.

Viewed in the light most favorable to the verdict, the evidence raises a fair inference of defendant's guilt. The evidence shows two white men parked the defendant's girlfriend's pickup truck one hundred yards north of and across the tracks from the J. I. Case plant. These two men were seen walking toward the plant wearing dark clothing and carrying flashlights and bolt cutters. Later an officer saw two white men wearing dark clothing walk from the plant making several trips to an area north of the plant in the direction of the defendant's girlfriend's pickup truck. The surveillance officer had not seen anyone else in the vicinity. All the bars and other businesses were closed. The defendant and his companion were arrested near the defendant's girlfriend's pickup--near the place to which the two white men wearing dark clothing had been seen dragging objects from the plant. When arrested, the defendant who is white was wearing dark clothing. His hands and clothing were covered with dirt. North of the tracks, the officers found a flashlight beside a pile of copper cable. Inside the plant, the officers found bolt cutters beside another pile of copper cable. Both piles of cable had been freshly cut, and there were drag marks between the plant and the wire near the tracks. The

officers found that a security window had been removed. The footprints of two people had been left in the snow outside the window and in the dust inside the window.

The officers asked the defendant "Whose truck is that?" referring to the defendant's girlfriend's truck. The defendant initially said he did not know. Later, the defendant admitted it was his girlfriend's truck and told the officers that the keys were in the driver's side door panel. The officers found the keys in the driver's side door panel. The defendant told the officers that he and his companion had just been walking to LeClaire, Iowa, which is approximately six or seven miles away. This they claimed to be doing at approximately 5:00 in the morning.

I believe the record contains substantial evidence sufficient to convince a rational juror of defendant's guilt beyond a reasonable doubt. Furthermore, I do not believe the trial court abused its discretion in admitting evidence concerning the weight and value of the copper cable. I would affirm defendant's conviction.