FILED
MAY 30 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed May 30, 1980
vs.	)	
MICHAEL P. McCOOL,	)	0-66 63652
Defendant-Appellant.	)	

Appeal from Black Hawk District Court - C. W. Antes, Judge, and William J. Klotzbach, Judge.

Defendant appeals his conviction of burglary in the second degree, a violation of section 713.3, supplement to the Code 1977. Affirmed.

Alvin R. Davidson, Assistant Public Defender, Black Hawk County Public Defender's Office, Waterloo, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Richard L. Cleland, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant, Michael P. McCool, appeals his conviction of burglary in the second degree, a violation of 713.3, supplement to the Code 1977. For reversal, he contends he did not consent to a warrantless search of his residence, rendering the search a violation of his fourth amendment rights, and insufficient evidence linking him with the burglary existed to allow the case to go to the jury. We affirm the trial court.

In determining whether the evidence was unconstitutionally seized, our review is de novo. State v. Kelly, 284 N.W.2d 236, 237 (Iowa 1979); State v. Ege, 274 N.W.2d 350, 352 (Iowa 1979). On the other matter, our review is limited to correction of errors at law. Iowa R. App. P. 4.

I.

A trial information, filed February 6, 1979, charged defendant with second degree burglary in connection with a break-in of a Waterloo apartment in which a television, clock radio, blanket, and foodstuffs were taken. On March 13, 1979, defendant filed a motion to suppress the evidence seized in a search of his residence, asserting he did not consent to the warrantless search. After an evidentiary hearing, the court overruled defendant's motion to suppress, finding defendant voluntarily and intelligently consented to the search. At trial, defendant renewed his motion to suppress and moved for a directed verdict on the grounds there was no "proof either direct or circumstantial of an entry made by defendant." The trial court overruled both motions. After the jury returned a verdict of guilty of burglary in the second degree, the court sentenced defendant to a prison term not to exceed ten years.

II.

Searches and seizures conducted without a warrant are per se unreasonable unless they come under one of several well defined exceptions. Ege, 274 N.W.2d at 353, quoted in Kelly, 284 N.W.2d at 238. Consent to the search is one such exception. Id; see Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043-44, 36 L. Ed. 2d 854, 858 (1973). The consent, however, must be freely and voluntarily given and not a mere submission to authority. Ege, 274 N.W.2d at 353. The burden is on the State to demonstrate by a preponderance of the evidence the officers' actions were lawful. State v. Folkens, 281 N.W.2d 1, 3 (Iowa 1979).

The issue of this case becomes essentially a factual one: whether defendant voluntarily consented to the search of his residence that resulted in the seizure of goods allegedly stolen by him. There is considerable dispute about the events surrounding the search and seizure. The two police officers testified defendant let them into the house, and after being informed of their purpose and his Miranda rights, consented to a search only after they attempted unsuccessfully to reach the owner to determine whether defendant had a right to be in the house. Defendant testified the police officers entered the house without permission, he asked the officers if they had a search warrant and not to look around the house until they had one, and he did not consent voluntarily to their search, but was coerced by the officers' display of authority and their statement that the house's owner had granted them permission to search. A witness, David Timmer, who was upstairs during this testified at the trial but not the suppression hearing. He stated he heard the defendant tell the officers not to look around and request they get a search warrant. Timmer also testified he did not hear the defendant ask the officers to leave or the officers state the owner of the house had granted them permission to look around or the defendant grant the officers permission to search.

After carefully considering all the evidence in the record, we defer to the trial court assessment of the witnesses' credibility and their conflicting stories and hold defendant consented voluntarily, intelligently, and knowingly to the search of his residence. See Kelly, 284 N.W.2d at 239. We do not find the police officers exerted unconstitutionally any claim of authority or undue coercion. See Ege, 274 N.W.2d at 353; State v. Peterson, 219 N.W.2d 665, 670 (Iowa 1974). Trial court correctly refused to suppress the seized evidence.

III.

Defendant also contends the trial court erred in refusing to grant his directed verdict of acquittal. He contends the State did not show by either direct or circumstantial proof he was involved in the entry into the complainant's apartment. Because the State's circumstantial evidence required inferences unsupported by the proofs, defendant argues all elements of his guilt were not proved beyond a reasonable doubt. We are unpersuaded.

The applicable principles of review of a ruling on a defendant's motion for directed verdict were stated in State v. Howard, 284 N.W.2d 201 (Iowa 1979):

> In considering trial court's ruling on defendant's motion for directed verdict the evidence will be reviewed in the light most favorable to the State. See, e.g., State v. Jones, 281 N.W.2d 13, 18 (Iowa 1979); State v. McDaniel, 265 N.W.2d 917, 922 (Iowa 1978). Every legitimate inference which reasonably and fairly may be deducted therefrom will be used to aid the evidence. See, e.g., State v. Fryer, 243 N.W.2d 1, 8 (Iowa 1976); State v. Lewis, 242 N.W.2d 711, 724 (Iowa 1976). Only that evidence which would support the judgment need be considered on review. State v. White, 223 N.W.2d 163, 164 (Iowa 1974). Our cases demonstrate a long-standing preference for submitting criminal cases to a jury if there is any substantial evidence tending to support the charge. See, e.g., McDaniel, 265 N.W.2d at 922; State v. York, 256 N.W.2d 922, 927 (Iowa 1977); State v. Anderson, 239 Iowa 1118, 1125, 33 N.W.2d 1, 6 (1948); Franks v. State, 1 Greene 541, 542 (Iowa 1848) (even if only circumstantial or remote proof).

Id. at 203.

The mere possession of stolen goods shown here, however, does not permit the conclusion beyond a reasonable doubt the possessor committed the underlying crime. State v. Lewis, 242 N.W.2d 711, 723 (Iowa 1976). Consequently, where a person possessing stolen property is charged with burglary there must be evidence in the record concerning the surrounding circumstances from which the jury can determine whether the evidence warrants a finding beyond a reasonable doubt of the presumed fact defendant committed the breaking and entering from the established fact of possession of recently stolen property. Id. Each case will be considered in light of its own peculiar factual setting in making the determination the standard of reasonable doubt has been satisfied. Id. The evidence will of necessity be circumstantial, id., which in such circumstances is as equally probative as direct evidence. State v. O'Connell, 275 N.W.2d 197, 205 (Iowa 1979), cited in Howard, 284 N.W.2d at 203.

In this case trial court had before it substantial evidence tending to support the charge and from which the jury could conclude beyond a reasonable doubt defendant broke into and entered complainant's home and stole certain items of value. Defendant visited complainant the day before the burglary and asked her if she had just gotten off work and whether she worked nights. Defendant was informed complainant would not be home on the night the illegal entry was subsequently made. Complainant also

testified defendant had lived in her apartment from December 15, 1978, to December 28, 1978, from which the jury could conclude defendant knew entry could be made into complainant's apartment through a window that was opened during the burglary. The testimony of David Timm provided a basis for the jury to conclude defendant was not at his home at 11:00 p.m. on January 29, 1979. Combining this testimony with defendant's possession of the stolen goods, we hold the trial court correctly found the jury could determine beyond a reasonable doubt defendant was guilty of burglary and correctly overruled defendant's motion for a directed verdict of acquittal. See Howard, 284 N.W.2d at 203; State v. Jones, 281 N.W.2d 13, 18 (Iowa 1979).

Trial court is affirmed.

AFFIRMED.