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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed October 18, 1979
vs.	)	
DAVID LAWRENCE WAGNER.	)	200
Defendant-Appellant.	)	<u>2-62774</u>

Appeal from Black Hawk District Court, William G. Klotzbach, Judge.

Defendant appeals his conviction of receiving and concealing stolen property worth more than twenty dollars in violation of section 712.1, The Code 1977. - Affirmed.

David R. Nagle, of Ball & Nagle, P.C., Waterloo, for Defendant-Appellant.

Thomas J. Miller, Attorney General of Iowa, and Richard Cleland, Assistant Attorney General, for Plaintiff-Appellee.

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

PER CURIAM

Defendant appeals his conviction of receiving or concealing stolen property worth more than twenty dollars in violation of section 712.1, The Code 1977. Defendant contends that the trial court erred by not directing a verdict of acquittal and by improperly submitting instructions to the jury on the charge of "receiving" stolen property. Defendant also contends that the trial court erred in refusing to grant defendant's motion for new trial on the ground that the evidence was insufficient to support a guilty verdict. We affirm.

Testimony at trial revealed that on August 25, 1977, Art Ruhs reported to the Waterloo Police Department that a box of antique pocket watches, as well as a small safe which was kept in a fruit cellar behind a padlocked door, were missing. Mr. Ruhs could only report the time he discovered that the items were missing, and was uncertain when they could have been taken. There was no evidence of forcible entry to the home or to the fruit cellar, and Mr. Ruhs testified that the only person who could have known where the key to the padlock on the fruit cellar door was hidden was the defendant, who had come to Mr. Ruhs' house to obtain some lamps to sell on consignment. Mr. Ruhs further testified that on that same visit, he showed his collection of antique pocket watches to defendant. Defendant contends that at that time, Mr. Ruhs gave him two of the watches to sell on consignment along with the lamps, and that he subsequently took those watches to his grandmother's antique shop in Keithsburg, Illinois, where they were discovered by Illinois authorities acting on information obtained from the Waterloo Police Department. Mr. Ruhs denies ever consigning or selling any watches to defendant. Defendant was alternatively charged with receiving or concealing stolen property in violation of section 712.1, The Code 1977. The jury returned a verdict of guilty on that charge.

I. Defendant contends that the State's theory of the case, as presented at trial, was that defendant himself stole the watches, and since a thief may not be charged with receiving the property that he stole, the trial court erred by not directing a verdict of acquittal on the charge of "receiving" stolen property, and further erred by submitting instructions to the jury on that particular charge. Defendant contends that the case of State v. Butler, 205 N.W. 842 (Iowa 1925) (not reported in State Reports) stands for the

proposition that when the evidence shows that the defendant was the actual thief, the defendant cannot be charged with receiving the stolen property. Defendant asserts that Butler cannot be distinguished from this case.

There is a clear distinction between Butler and the case at bar. In Butler, all the evidence tended to prove that the defendant committed the physical act of stealing the property. In this case, however, there was no evidence to show that defendant committed the physical act of stealing the watches, rather, that defendant was the only one besides the victim who had the knowledge required to commit the crime--the knowledge of where the key to the fruit cellar door padlock was hidden. That defendant had this knowledge does not preclude his committing the crime of receiving stolen property since this knowledge could have been conveyed to another who actually committed the physical act of stealing and then delivered the stolen property to defendant. The language of Butler itself distinguishes that case from this one when the supreme court said, "It is elementary that if he alone was guilty of larceny, he could not be guilty of receiving stolen property." Butler, 205 N.W. at 843 (emphasis added). See State v. Houston, 211 N.W.2d 598, 600 (Iowa 1973). This indicates that if a defendant is involved in a conspiracy to steal, or was merely an accomplice or an accessory to the theft, a charge of receiving stolen property is not necessarily precluded. In fact, even though Iowa law no longer recognizes any distinction between an accessory and a principal in the commission of a crime, a claim that one could have been indicted as a principal in some other offense such as burglary or larceny is no defense to a charge of receiving stolen property. State v. Smith, 219 Iowa 168, 176-77, 256 N.W. 651, 655-56 (1935) (quoting State v. Boyd, 195 Iowa 1091, 1097, 191 N.W. 84, 87-88 (1922)).

When considering the propriety of a trial court's ruling on a directed verdict, we view the evidence in the light most favorable to the State, whether or not it is contradicted, and every reasonable inference that can be deduced from the evidence must be considered to support and supplement that evidence. State v. Jones, 281 N.W.2d 13, 18 (Iowa 1979); State v. Overstreet, 243 N.W.2d 880, 883 (Iowa 1976). If there is any substantial evidence tending to support the charge, the case should be submitted to the jury. State v. Dykers, 239 N.W.2d 855, 859 (Iowa 1976); State v. Sheffey, 234 N.W.2d 92, 96 (Iowa 1975).

In light of the foregoing analysis, we think that there was sufficient evidence to

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submit to the jury both alternative charges of receiving or concealing stolen property. The State elected to assert alternative means by which defendant could have committed the crime of receiving stolen property: defendant could have stolen the watches himself and subsequently "concealed" them; or defendant could have engaged another in the physical act of stealing the watches and then "received" them from that accomplice. The trial court cannot be required to force the State to elect between those means. State v. Houston, 211 N.W.2d 598, 600 (Iowa 1973).

II. Furthermore, Iowa follows the rule that unexplained possession by the accused of recently stolen property justifies an inference that the accused illegally received the property. State v. Browning, 269 N.W.2d 450, 453-54 (Iowa 1978); Houston, 211 N.W.2d at 600. This permissible inference has been held to comport with due process. Barnes v. United States, 412 U.S. 837, 844-46, 93 S. Ct. 2357, 2362-63, 37 L. Ed. 2d 380, 387 (1973). Defendant contends, however, that since he offered an explanation for his possession of the property—that he received the watches from Mr. Ruhs on consignment—the use of the inference should be precluded. However, such a contention requires the assumption that the explanation is truthful. Rather than requiring such an assumption of truthfulness, it is the long-standing rule in this state that an accused's explanation of possession of recently stolen property raises a credibility question within the province of the trier of fact to resolve. State v. Dykers, 239 N.W.2d 855, 859-60 (Iowa 1976); State v. Rosewall, 239 N.W.2d 171, 173-74 (Iowa 1976) (quoting State v. Everett, 157 N.W.2d 144, 146 (Iowa 1968), overruled on other grounds, State v. Hawkins, 203 N.W.2d 555, 557 (Iowa 1973)); State v. Dwinells, 259 Iowa 945, 951, 146 N.W.2d 231, 235 (1966); State v. Girdler, 251 Iowa 868, 873, 102 N.W.2d 877, 879 (1960); State v. Prentice, 192 Iowa 207, 214, 183 N.W. 411, 413 (1921); State v. Hessians, 50 Iowa 135, 136 (1878); see State v. Browning, 269 N.W.2d 450, 454 (Iowa 1978) (jury could reasonably find that no plausible explanation was made for defendant's possession consistent with innocence). Thus, the jury could decide whether to believe defendant's explanation that Art Ruhs consigned the watches to him, or Art Ruhs' denial that he ever consigned the watches to anyone. If the jury believed defendant's explanation, they would not have made the inference that would lead to defendant's guilt. On the other hand, if they did not believe defendant's explanation, they would be permitted to infer that defendant illegally received the watches. If we would adhere to defendant's argument—that any

explanation by the accused precludes permitting the use of the inference--the trier of fact would be required to assume that the accused's explanation, no matter how farfetched and incredible, was true. We decline to remove the determination of the credibility of an accused's explanation of possession of recently stolen property from the province of the trier of fact.

III. Next defendant contends that if the inference was to be submitted to the jury, the trial court's Instruction No. 10 was defective in that it did not instruct the jury on the specific inferences they were to make; it did not instruct the jury that they were not required to make the inference; and it failed to instruct the jury that any inference they made had to be reconciled to be consistent with guilt. The instruction submitted to the jury stated:

INSTRUCTION NO. 10

The knowledge that a person possesses at a particular time is seldom capable of direct proof. It must ordinarily be determined from the words and conduct of the person involved, and from such just and reasonable inferences as may be drawn therefrom in accordance with common experience and observation.

This instruction is substantially the same as the Uniform Jury Instruction No. 230 on "knowledge." Defendant did not object to, except to, or offer an alternative instruction before this instruction was submitted to the jury. Defendant did raise the issue of the possible defects in this instruction at the hearing on his motion for a new trial. Apparently, defendant is not arguing that the instruction was incorrect on its face, but rather that the instruction was not sufficiently specific on the inference the jury was permitted to make. While it is ordinarily true that an objection to an instruction in a motion for new trial is sufficient to preserve the error of the instruction despite a failure to object before submission of the instruction to the jury, an exception to that rule exists when an instruction on an integral issue is correct as proposed but not as explicit as a party desires. In such a situation, the party desiring a more explicit instruction is required to object to the instruction before it is submitted to the jury for the error of the instruction to be preserved. State v. Templeton, 258 N.W.2d 380, 382 (Iowa 1977); State v. Hackett, 197 N.W.2d 569, 572 (Iowa 1972); State v. Brown, 172 N.W.2d 152, 156-60 (Iowa 1969). Consequently, we conclude that defendant has failed to preserve error on the issue of the alleged deficiency of the instruction on inferences.

IV. Defendant lastly contends that the evidence in the case was insufficient to support the jury's guilty verdict and the trial court erred by refusing to grant defendant's motion for a new trial on that ground. Defendant asserts the indistinguishability of State v. Streit, 205 N.W.2d 742 (Iowa 1973), in which the State's evidence, showing a timetable that made it impossible for the defendant to have committed the crime, justified a reversal of the jury's guilty verdict. However, the case at bar is substantially different from Streit. Here, the State's evidence did not establish a definite timetable of events as was established in Streit. The State's chief witness, Art Ruhs, was clearly uncertain about when the actual theft of the watches took place. That the testimony of the State's chief witness was somewhat inconsistent and uncertain, while witnesses for the defense may have appeared unwavering and definite, are matters that the jury can appropriately consider when determining the credibility and weight to be attached to each item of testimony.

In reviewing a defendant's appeal from a criminal conviction, we view the evidence in the light most favorable to the State, without consideration of contradictions or inconsistencies, and the benefit of all reasonable inferences is given to the State. It is the role of the factfinder to resolve questions of fact and determine the credibility of witnesses. A finding of guilt by the trier of fact is binding on the appellate court unless it is found to be without substantial support in the record or is clearly against the weight thereof. State v. Jones, 271 N.W.2d 761, 763 (Iowa 1978); State v. Herndon, 257 N.W.2d 19, 22 (Iowa 1977); State v. Overstreet, 243 N.W.2d 880, 884 (Iowa 1976).

Defendant's contention that the evidence was insufficient to support a finding of guilt is based almost entirely on the inconsistencies of the testimony of Art Ruhs. For a witness' testimony to obviate the need for submitting a case to a jury as a matter of law, that testimony must be so contradictory that it entirely destroys its probative effect. State v. Still, 208 N.W.2d 887, 891 (Iowa 1973); State v. Hammer, 246 Iowa 392, 396, 66 N.W.2d 490, 492 (1954). We cannot conclude that Mr. Ruhs' testimony was so contradictory that the jury's guilty verdict was contrary to law. The jury was confronted with a conflict between the testimony presented by the State, mainly by Mr. Ruhs, and the testimony of the defense witnesses. This conflict must have been resolved by the jury's exercise of its role as the determiner of credibility and weight.

We cannot say that the jury in this case, with the opportunity to observe firsthand the appearance and demeanor of the witnesses, could not find Art Ruhs' inconsistent testimony to be more believable than the testimony produced by the defense witnesses. In a sense, the validity of the jury system itself depends on our exercise of judicial restraint when asked to set aside a jury's verdict, and we will refuse to do so unless the verdict is clearly unjustified. State v. Dwinells, 259 Iowa 945, 952, 146 N.W.2d 231, 235 (1966).

Since we do not find that the jury's guilty verdict was clearly unjustified, we affirm defendant's conviction of receiving or concealing stolen property worth more than twenty dollars in violation of section 712.1, The Code 1977.

AFFIRMED.

All judges concur, except Oxberger, C.J., and Johnson, J., who dissent.

OXBERGER, C.J. (dissenting)

I dissent. The majority apparently concedes that if defendant was the sole thief he cannot be convicted of receiving stolen property. The majority seeks to distinguish the case at bar from Butler claiming the defendant had an accomplice who gave him the stolen merchandise. However, the State version of the case, from opening statement through closing argument, was that defendant was the thief. There is not one shred of evidence to speculate that the defendant had an accomplice. A great deal of the State's evidence focused upon showing by circumstantial evidence that the defendant was the thief. The trial court should have dismissed the receiving charge and submitted the case to the jury on the concealing charge only.

I would reverse and remand for a new trial.

Johnson, J., joins this dissent.