FILED
MAY 31 1988
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed May 31, 1988
vs.	)	217
PAUL HIRAM CALDWELL,	)	7-328 86-1244
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Humboldt County (3047 & 3082), Newt Draheim, Judge.

Defendant petitioned this court for rehearing on grounds that our previous opinion demonstrated the decision was based upon evidence referred to in the State's brief that did not appear in the record. **REVERSED.**

Charles L. Harrington, Chief Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Bruce Kempkes, Assistant Attorney General; and Kurt J. Stoebe, Humboldt County Attorney; for plaintiff-appellee.

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

SCHLEGEL, J. 213

On July 8, 1985, Paul Hiram Caldwell was charged by trial information with possession of burglar's tools. See Iowa Code § 713.7 (1985). Trial commenced on July 30, 1986, and, one day later, the jury found Caldwell guilty of that offense. Caldwell's motions for new trial and in arrest of judgment were denied and he was sentenced to an indeterminate term of incarceration not to exceed ten years.

On appeal, we affirmed the district court by opinion filed on March 9, 1988. Caldwell petitioned this court for rehearing on grounds that our opinion demonstrated that the decision was based, in part, upon evidence referred to in the State's brief that did not appear in the record. Having determined that Caldwell is correct in that assertion, we granted rehearing. Upon further examination of the record in this case we find that there was insufficient evidence upon which to convict the defendant and we vacate our former opinion and reverse the conviction herein and remand this case to the district court for dismissal of the charge of possession of burglar's tools.

Caldwell maintains his conviction is unsupported by substantial evidence. The principles applicable to our review of such a challenge are stated in State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985), as follows:

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

The evidence presented, however, must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture. State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981).

The statute under which Caldwell was convicted provides in pertinent part as follows:

> Any person who possesses any key, tool, instrument, device or any explosive, with the intent to use it in the perpetration of a burglary, shall be guilty of possessing burglar's tools.

Iowa Code § 713.7 (1985). As set forth in the district court's instructions, conviction required (1) the possession of keys and tools, and (2) proof that defendant had the intent to use the keys and/or tools in the commission of a burglary. Caldwell does not contest the possession element. He does contend, however, that the evidence proffered at trial fell short of that necessary to establish the requisite intent.

The intent element may be proven by circumstances surrounding the possession. See State v. Furlong, 216 Iowa 428, 432-33, 249 N.W. 132, 134 (1933). As stated in State v. Van Voltenberg, 260 Iowa 200, 206, 147 N.W.2d 869, 873 (1967):

> The statutory enactment here in question does not denounce as unlawful the possession of any particular implements or tools. Possession of a specific instruction or combination of articles may or may not be prohibited by law, depending upon whether the evidence reveals circumstances from which it may be inferred beyond a reasonable doubt the party or parties, standing in the position of a possessor, intended use of the article or instrumentalities for the purpose of committing or aiding in the perpetration of a burglary.

In State v. Hobbs, 252 Iowa 432, 437, 107 N.W.2d 238, 241 (1961), our supreme court cited with approval the following excerpt from 12 C.J.S. Burglary § 69, at 754:

> It is sufficient to show that defendant had a general intent to use tools or implements for a burglarious purpose, and the intention as to any particular time or place of using the same is not material.

The State established that at approximately 2:00 a.m., an attempted burglary took place at the Farmer's Cooperative Elevator in Ottosen, Iowa. A man was seen at the scene and fled into an adjacent corn field on foot; however, there is no question but that this individual was not Caldwell. The manager, Ron Powell, was notified and, while driving to Ottosen, and at a point approximately four miles from Ottosen, observed a van and a pickup parked side-by-side on a side road. As he approached, the two vehicles turned on their lights and turned onto the road upon which Powell was traveling, and proceeded toward Powell. After they passed by him, Powell turned around and followed them. The pickup, which had been following the van, passed the van and both vehicles, upon reaching an intersection, turned in opposite directions. Powell followed the van and recorded its license plate number. Powell then proceeded to Ottosen.

At approximately 4:00 a.m., Officer Leon Larson was sitting in his squad car on stakeout at a point approximately two miles west of Ottosen. He observed a vehicle approaching his position from the west, and believed that it had been travelling with its lights off just prior to his observation of its headlights. As it passed him, he observed that it was a van, and upon following it, determined that it was a van bearing the license plate number that had been obtained by Powell. Larson then radioed for help and stopped the van. Larson requested the driver of the van, Caldwell, to step out. Larson noticed a police scanner and a set of walkie-talkies in the front seat of the van. Caldwell, A Des Moines resident, stated that he had been visiting a girlfriend in Minnesota. He told the police that the van belonged to a woman, whose name he did not remember, in Des Moines, a fact that was verified by the police.

The police conducted a search of the van at the scene of the stop, and found and removed a portable scanner, two walkie-talkie CB radios, and various tools. Later, in the execution of a search warrant, the officers removed a flashlight, two screwdrivers, a roll of wire, several keys, a crowbar, a fence stretcher (referred to in the record as a come-along), a jack handle, two wooden blocks, a 12-ton jack, a tire wrench, a tire iron, a block and tackle, a padlock, a vacuum bag, a piece of black plastic, a bent bolt, a hanger (bent into an odd shape), and some maps of Iowa.

Considering all the circumstances of the stop of Caldwell, and assuming the correctness of all the testimony of the State's witnesses, there is nothing in the record to show any connection between Caldwell and the attempted break-in at the elevator in Ottosen. Furthermore, there is inadequate evidence to show that there was any intent to use the tools found to be in Caldwell's possession in a burglarious manner.

As to the attempted burglary of the elevator, the tire tracks did not match the tire tread of the van. Caldwell's shoes, which the police officers seized for comparison, did not have the same tread design as the footprints found at the scene of the attempted burglary. The tools used in that attempt were left at the scene, and were specially adapted to be used as burglar's tools. Added to this is the fact that all items removed from the van were tested for fingerprints, and no prints of Caldwell were found on any of those items.

The investigating officers suspected that Caldwell was somehow involved in burglarious activity, and was probably an accomplice to the person seen running away from the Ottosen elevator. Their belief that it was suspicious for the van to have been seen four miles from the crime scene, parked beside a pickup truck on a country road; for it to be observed again, apparently having its lights off just prior to being observed; and that it was a vehicle licensed

in a county some considerable distance from the area, may have been a reasonable belief, and one which would lead to a desire to check out its reason for being there in those circumstances. Mere suspicion, however, does not justify the inference that the tools in Caldwell's possession were there for some burglarious purpose. The evidence "must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d at 479.

Considering all the circumstances and viewing the evidence in the light most favorable to the State, there was insufficient evidence to submit the charge of possession of burglar's tools to the jury. Defendant's motion for directed verdict of acquittal on that charge should have been sustained.

Having determined this case on the issue of sufficiency of the evidence, we need not consider the propriety of the court's ruling on defendant's motion to suppress the fruits of the search of the van.

REVERSED.