IN THE COURT OF APPEALS OF IOWA

FILED
DEC 30 1981
CLERK SUPREME COURT

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
WILLIAM B. JONES,)
Defendant-Appellant.

Filed December 30, 1981

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65236

Appeal from Webster District Court, R. K. Richardson, Judge.

The defendant appeals from his conviction for theft in the second degree in violation of section 714.2(2), The Code 1979. The defendant asserts the trial court erred in giving an instruction permitting the jury to infer that the defendant stole property from proof of his recent possession of stolen property, and in giving an instruction on circumstantial evidence which did not give the traditional rule regarding the sufficiency of such evidence. Defendant additionally asserts that the evidence was insufficient to support the jury verdict. AFFIRMED.

David J. Lawler, Fort Dodge, for appellant.

Thomas J. Miller, Attorney General, and Roxann M. Ryan, Assistant Attorney General, for plaintiff-appellee.

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

PER CURIAM

The defendant appeals from his conviction of theft in the second degree in violation of section 714.2(2), The Code 1979. The defendant asserts the trial court erred in giving an instruction permitting the jury to infer that the defendant stole property from proof of his recent possession of stolen property, and in giving an instruction on circumstantial evidence which did not give the traditional rule regarding the sufficiency of such evidence. Defendant additionally asserts that the evidence was insufficient to support the jury verdict. We affirm.

Defendant and his brother attempted to sell recently stolen tools to a police officer at 4:00 a.m. on October 9, 1979, and the officer testified that they told him they had gotten the tools from a United States Gypsum plant. The defendant's brother worked at the United States Gypsum plant. Officers arrested defendant and his brother, and took from them tools which were identified as being stolen.

On November 21, 1979, the defendant was charged by county attorney's information with the crime. The case went to trial, and on April 16, 1980, the jury returned a guilty verdict on the theft charge.

I. Recent Possession Instruction. Defendant first asserts that the trial court erred when it gave an instruction permitting the jury to infer that the defendant stole the property from proof of his recent possession of the stolen property. Defendant challenges the "matter and extent" to which the jury was allowed to use the inference in determining his guilt.

The instruction itself provided that the jury should consider "all other facts and circumstances shown." And the other instructions, as the State points out, direct the jury to weigh all the evidence, not to consider just the inference of recent possession. Thus, when we read the instructions as a whole, as State v. Savage, 288 N.W.2d 502, 508 (Iowa 1978) directs, we do not find an impermissible emphasis upon the recent possession inference. The trial court did not err in giving that instruction.

II. Circumstantial Evidence Instruction. Defendant next argues the court erred in giving Instruction No. 4 on circumstantial evidence. The instruction read in part as follows: "Whether the evidence in this case is direct or circumstantial, or a combination thereof, you are instructed that before you can convict the defendant, you

must be satisfied of his guilt beyond a reasonable doubt from all the evidence in this case."

Defendant objected to the instruction and requested that the court include in the instruction language which said that circumstantial evidence must be entirely consistent with guilt and exclude every rational hypothesis of defendant's innocence. The court overruled the exception on the basis of State v. O'Connell, 275 N.W.2d 197 (Iowa 1979).

Defendant readily concedes that the language he requested is not required under Iowa law. However, he would like us to either overturn or modify O'Connell so as to require such language in the instruction. We decline to do so, as that is a matter exclusively for the supreme court to determine.

III. Sufficiency of Evidence. Defendant's final argument is that there was insufficient evidence to support the jury's verdict because the only evidence of his guilty was the inference of recent possession.

"In viewing this matter, we consider the evidence in the light most favorable to the State and accord it all reasonable inferences." State v. Poyner, 306 N.W.2d 716, 718 (Iowa 1981). There are sufficient inferences to be gathered from the evidence to support the verdict. The record shows that the defendant and his brother approached an officer at 4:00 a.m. and offered to sell him tools they said they had gotten from the United States Gypsum plant. They negotiated a deal with the officer and arranged to meet him later that morning. When defendant was arrested, the tools he had in his possession were in fact the tools stolen from the United States Gypsum plant. The defendant's brother worked at the plant. The defendant and his brother, at the time of arrest, made only general statements about a person downtown from whom they had supposedly bought the tools, and at trial they offered only that statement in their defense to prove that they had bought, rather than stolen, the tools. Defendant did not testify himself.

This evidence was sufficient for the jury to conclude that the defendant had stolen the tools, and we accordingly affirm the conviction.

AFFIRMED.