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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	November 10, 1977
vs.	)	275 / 59397
JOHN LACEY SHAEPPERKOETTER,	)	
Appellant.	)	

Appeal from Linn District Court - William R. Eads, Judge.

Appeal from conviction of larceny of a motor vehicle and being a habitual criminal raising issues of constructive possession constituting evidence of larceny and submission of the lesser included offense of operating a motor vehicle without the owner's consent. - Affirmed.

Louis A. Merrifield, of Cedar Rapids, Jon M. Kinnamon, of Cedar Rapids, and Mark C. Meyer, of Iowa City, for Appellant.

Richard C. Turner, Attorney General of Iowa, Raymond W. Sullins, Assistant Attorney General and Eugene J. Kopecky, Linn County Attorney, for Appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant John Lacey Schaepperkoetter appeals his conviction by jury of the crime of larceny of a motor vehicle in violation of § 321.82, The Code. On appeal defendant raises two issues. First, was there sufficient corroborating evidence to permit the jury to infer from the evidence of his possession of a recently stolen motorcycle that defendant had stolen the motorcycle or that he possessed the intent to permanently deprive the owner of his property and whether the trial court erred in overruling defendant's motions for directed verdict, judgment of acquittal and new trial. Secondly, whether the trial court, in a trial for larceny of a motor vehicle, erred in refusing to instruct the jury on the lesser included offense of operating a motor vehicle without the owner's consent.

Defendant's first assignment of error is that the trial court erred in overruling his motions for directed verdict and judgment of acquital. He also argues that the trial court erred in overruling his motion for new trial and judgment of acquital made after the return of the verdict. We treat this latter claim as one of sufficiency of the evidence as well as a renewal of the original claim for directed verdict.

In making a determination as to the propriety of the trial court's ruling on a motion for directed verdict in a criminal case this court views the evidence in the light most favorable to the State regardless of whether it is contradicted and every legitimate inference that may be fairly and reasonably deducted therefrom must be carried to the aid of the evidence. The cause should be submitted to the jury and the court should not direct a verdict of acquital if there is any substantial evidence reasonably tending to support the charge. State v. Overstreet, 243 N.W.2d 880, 883-84 (Iowa 1976); State v. Lewis, 242 N.W.2d 711, 724 (Iowa 1976); State v. Dahlstrom, 224 N.W.2d 443, 447-48 (Iowa 1974).

On an appeal from a criminal conviction challenging sufficiency of evidence to sustain the verdict, we view the evidence in the light most favorable to the State and accept as established all reasonable inferences tending to support the action of the jury. It is necessary to consider only the supporting evidence whether contradicted or not. It is for the fact finder, not us, to resolve questions of

credibility of witnesses. And a finding of guilt is binding on this court unless without substantial support in the record or against the weight thereof. **Overstreet**, supra; **Dahlstrom**, supra; State v. Jellema, 206 N.W.2d 679, 681 (Iowa 1973).

Defendant's principal contention is that the State failed to prove he had anything to do with the carrying away of the motorcycle or that he was in any way connected with the larceny. He also argues the State failed to prove he had any felonious intent or that he had possession of the motorcycle. The unexplained possession by defendant of recently stolen property justifies an inference of guilt. State v. Rosewall, 239 N.W.2d 171, 173 (Iowa 1976); State v. Girdler, 251 Iowa 868, 873, 102 N.W.2d 877 (1960). To warrant such an inference there must be proof that: 1) the property described in the indictment was stolen; 2) the property possessed by the accused was the stolen property; and 3) the possession was reasonably recent. State v. Brightman, 252 Iowa 1278, 1281, 110 N.W.2d 315 (1961). When possession by defendant is established, it creates an inference barring a motion for directed verdict and guilt of the crime of larceny is inferred. **State v. Rosewall**, supra at 174.

John Becker was the owner of the motorcycle in question. He left his motorcycle outside his apartment house and the next morning when he went to use it, it was gone. He then called the police department and reported it stolen. Becker testified he did not give anyone permission to drive it and it was locked the night before. He identified State's Exhibit 1 as his motorcycle based upon the physical characteristics and the Vehicle Identification Number on the registration.

Robert Knutson, a police officer, testified that State's Exhibit 1 appeared to be the same motorcycle he found in an open U-Haul trailer near the location where defendant's car was found. James Blood testified the defendant attempted to sell him a motorcycle which Blood believed to be stolen, because of the low asking price and defendant's unfamiliarity with the motorcycle. Blood further stated defendant and another person took him to where the U-Haul was located for the purpose of looking over the motorcycle. The U-Haul was rented by defendant in his own name. When the U-Haul doors were opened by defendant's companion, Blood saw the motorcycle inside. A fight then occurred between Blood and defendant's

companion. Defendant drove off in his car. Blood ran after the car, jumped on the trailer hitch of the car, and proceeded to climb in the back window. When the car missed a turn and went off the road, Blood jumped off to the ground. He saw the car crash into a boxcar.

Under **Brightman**, the jury was permitted to infer that defendant was guilty of the larceny of the motorcycle. See **State v. Rosewall**, supra. Further, the jury could infer that defendant had the requisite felonious intent because of Blood's testimony that defendant attempted to sell him the motorcycle. Such acts are inconsistent with an intent to return the vehicle.

Defendant argues the State is not entitled to the benefit of any inference of guilt from his constructive possession of recently stolen property. He claims to permit the State such an inference, fails to satisfy the reasonable doubt standard, because proof of an essential element, i.e. the taking and carrying away, depends solely on the use of this inference of guilt.

A similar argument was raised by the defendant in State v. Lewis, 242 N.W.2d 711 (Iowa 1976). Lewis argued to conclude that recent possession of stolen merchandise is sufficient to convict the possessor of breaking and entering is a conclusion based upon inferences derived from inferences. 242 N.W.2d at 716. The **Lewis** court rejected defendant's argument that the inference was unconstitutional. It stated: "... there must be evidence in the record relating to the surrounding circumstances for the jury to consider in determining whether the evidence warrants a finding beyond a reasonable doubt of the presumed fact ... from the proved fact he possessed recently stolen property." **Lewis**, supra at 723. As long as the circumstantial evidence is consistent with defendant's guilt and wholly inconsistent with any rational hypothesis of his innocence there is no problem with the inference. Cf. State v. Jellema, 206 N.W.2d 679, 681 (Iowa 1973).

From a review of this record, we believe the court was correct in overruling defendant's request for a directed verdict and submitting the case to the jury. It is the province of the jury to pass upon the defendant's explanation of his alleged possession of the recently stolen motorcycle. **State v. Rosewall**, supra at 174. It was also for the jury, as finder of fact, to determine whether from the evidence

defendant in fact had possession of the motorcycle.

Defendant's second contention is that the trial court erred in refusing to instruct the jury on the lesser included offense of operating a motor vehicle without the owner's consent. Section 321.72, The Code. A lesser included offense is appropriate for submission when (1) the elements of the lesser offense are an elementary part of the greater offense (the legal test) and (2) there is a factual basis in the record for submitting the included offense to the jury (the factual test). **Rosewall**, supra. See also: Everett v. Brewer, 215 N.W.2d 244, 246 (Iowa 1974); State v. Habhab, 209 N.W.2d 73, 74-75 (Iowa 1973); State v. Hawkins, 203 N.W.2d 555 (Iowa 1973).

The supreme court has recognized that the elements of larceny of a motor vehicle include the elements of operating a motor vehicle without the owner's consent thus satisfying the legal test requirement. **Habhab**, supra; **Hawkins**, supra However, we do not believe the factual test was satisfied. In **Hawkins**, the court quoted from State v. Marshall, 206 Iowa 373, 377, 220 N.W. 106, 107 (1928):

> This, of course, is all subject to the further rule that the evidence must justify the submission of the included offense. That is to say, even under the charge, if there is no evidence from which the jury could find the defendant guilty of the included offense, then such included offense need not be submitted. (Citations). Also, where under the evidence the defendant is clearly guilty of the offense charged or not guilty, it is not error to fail to give instructions with reference to included offenses. (Citations).
>
> We turn now to the evidence in the case for an application of these rules. * * *" 206 Iowa at 377, 220 N.W. at 107.

In the instant case there was insufficient evidence the motorcycle had been operated or driven away to justify submission of the lesser offense. The only evidence that supports operation is the testimony by Blood that it would be difficult to hot wire the motorcycle, but it could be done. Becker, the owner, gave no-one permission to drive the motorcycle, left it locked, and took the key with him. Nobody saw the motorcycle driven away and there is no other evidence which suggests the vehicle was driven. See Interest of Champion, 221 N.W.2d 773 (Iowa 1974).

Judgment affirmed.