

**FILED**

JAN 29 1986

CLERK SUPREME COURT

**IN THE COURT OF APPEALS OF IOWA**

**STATE OF IOWA,**

)

**305**

Plaintiff-Appellee,

)

Filed January 29, 1986

vs.

)

**LARRY DEAN DAYE,**

)

5-592  
85-230

Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County - Louis A. Lavorato,  
Judge.

Defendant appeals from the judgment and sentence entered upon his conviction of burglary in the second degree, in violation of Iowa Code sections 713.1 and 713.5 (1983), after trial to the court. Defendant contends he was not proven guilty beyond a reasonable doubt. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Roxann M. Ryan, Assistant Attorney General; Rich Williams and Harlan Lemon, Assistant County Attorneys, for plaintiff-appellee.

Considered by Oxberger, C.J., and Snell and Hayden, JJ.

On October 5, 1984, defendant Larry Dean Daye was charged with burglary in the second degree. Daye waived his right to a jury trial.

At trial, only the sixty-one year old burglary victim and Daye testified. The victim testified that Daye lived in a four-unit apartment building, one floor below her. Daye and the victim had been employed at the same health care facility. When the victim arrived home from work on May 17, 1984, she found the lock on her door was broken and a number of her possessions were missing, including three televisions, a camera, a stereo, cassettes, a watch, clothing, and a sewing machine. After calling the police, the victim went to the apartment house yard where she saw Daye and told him someone had broken into her apartment. Daye replied, "I didn't," or words to that effect. The victim asked the other tenants if they had seen anything taken. One reported that Daye was seen taking photographs in the yard. This appeared suspicious to the victim because Daye did not own a camera and her camera was one of the items missing from her apartment.

Acting on these suspicions, the victim gained entry to Daye's apartment in his absence through a third party who was in Daye's apartment. She found a number of her possessions in Daye's walk-in closet. Photographs of her property on Daye's premises were introduced into evidence at the trial.

When the victim confronted Daye with what she had discovered, Daye locked his apartment door and left. The police came but declined to act until Daye returned with the key. The landlord said he did not have a key to Daye's apartment. Therefore, the victim and her family stayed outside Daye's door all night to prevent his moving her belongings off the premises. The next morning the landlord unlocked the door and the police helped the victim move her belong-

ings back to her apartment. The victim testified that she did not give Daye permission to enter her apartment while she was at work.

Daye testified that on May 17, 1984, he was away from the apartment building most of that day and left his key in the custody of a woman with whom he had been living. He claimed that when he returned home that evening he found his place had been broken into. He went to the victim's apartment to ask her if she had seen anyone break into his apartment and she informed him of her own burglary. He left the building to buy cigarettes and when he returned the victim confronted him claiming that he had stolen her property. When neighbors and friends of the victim began to gather and threaten him, he locked his apartment and left. He claimed to have no knowledge of the third party the victim claimed let her into his apartment in the first place. Daye also denied breaking into the victim's apartment. He claimed under cross-examination that he never saw the victim's belongings in his closet either.

The court concluded in its findings that "Property was stolen from the apartment. The property was found in defendant's possession and the possession was recent. The court does not accept defendant's denial of knowledge of how the property found its way into his apartment. The possession is unexplained. Given these facts in light of the surrounding circumstances as shown by the evidence, the court may, but is not required to, infer defendant was the one who broke or entered [the] apartment." The trial court found Daye guilty as charged.

On appeal, Daye contends that he was not proven guilty beyond a reasonable doubt. He argues that the trial court impermissibly inferred his guilt merely because the victim's recently-stolen property was discovered in his apartment. Daye asserts that the State failed to present evidence of surrounding circumstances connecting him with the crime.

We must determine whether the facts of this case viewed in the light most favorable to the verdict could convince a rational trier of fact beyond a reasonable doubt that the defendant was guilty of burglary. See State v. Robinson, 288 N.W.2d 337, 339-40 (Iowa 1980). All of the evidence presented at trial must be considered and all legitimate inferences that may be deducted therefrom will be accepted. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981).

"[In] Iowa as well as in numerous other jurisdictions, the law has long allowed juries to employ the permissible inference possession of recently stolen property may be utilized as proof defendant committed a breaking and entering." State v. Lewis, 242 N.W.2d 711, 716 (Iowa 1976). However, in Lewis, the Iowa Supreme Court established that mere possession of recently-stolen property is not alone sufficient for a burglary conviction.

In our opinion bare proof of possession of property recently stolen does not permit, as a matter of law, the rational juror to conclude beyond a reasonable doubt the possessor committed the break in since possession alone could well support an inference of guilt for other crimes besides burglary. Consequently, where a party in possession of recently stolen property is charged with burglary 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 defendant committed the breaking and entering from the proved fact he possessed recently stolen property.

Id. at 723.

Surrounding circumstances must, therefore, exist in the case at bar which warrant finding the presumed fact that Daye committed the burglary from the proved fact that he possessed recently-stolen property. The court in Lewis

gave some guidance as to what evidence of surrounding circumstances beyond possession of stolen property is required to support a conviction.

[A]ll of the evidence of surrounding circumstances must be considered in arriving at a finding that the possessor is the thief, and the conviction may be based on circumstantial evidence alone, provided the evidence meets the standard of proof beyond a reasonable doubt . . . .

The evidence of surrounding circumstances that one should consider in appraising the evidence of possession, will be different in every case, and no description of it can be more than suggestive. "Some of the significant circumstances can be the appellant's conduct; the appellant's relationship to the victim; the elapsed time between the appellant's possession and the theft; the situs of the theft and the situs of the possession; the kind of property; the quantity of property; and the identifying characteristics of the property." (emphasis added)

Id. at 722 (quoting Commonwealth v. Simmons, 233 Pa. Super. 547, 336 A.2d 624, 629-30 (1975)).

In the case at bar, there is evidence in the record relating to the surrounding circumstances which the trier of fact considered beyond Daye's mere possession of stolen property. The situs of the burglary was the victim's apartment which was located one floor above Daye's apartment where the stolen property was discovered. Because of the size and quantity of the stolen property, it could not easily be moved a great distance without notice, yet none of the other tenants noticed anything being taken from the building. As a close neighbor and co-worker of the victim said, it is probable that Daye knew of the victim's working hours and when she would be absent from her apartment. Furthermore, the victim's stolen property was found in Daye's closet within a few hours of the burglary, indicating recent possession.

Viewing the totality of the evidence presented, including Daye's unexplained possession of all of the victim's stolen property, we conclude that a rational

trier of fact could reasonably conclude that Daye was guilty of burglary beyond a reasonable doubt.

**AFFIRMED.**