IN THE COURT OF APPEALS OF IOWA

No. 9-473 / 08-0522
Filed July 22, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KHOI NGO,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Khoi Ngo appeals his convictions for theft in the first degree, conspiracy to commit burglary, possession of burglar's tools, and carrying weapons. **AFFIRMED.**

John C. Heinicke of Kragnes & Associates, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John P. Sarcone, County Attorney, and James Ward, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

MANSFIELD, J.

Khoi Ngo appeals his convictions for theft in the first degree, conspiracy to commit burglary, possession of burglar's tools, and carrying weapons. He contends: (1) his trial counsel was ineffective for failing during the suppression hearing to challenge the evidence that he was speeding, and absent that evidence, the trial court should have granted his motion to suppress; (2) there was insufficient evidence to sustain his convictions; and (3) the district court erred in accepting his statements regarding his prior felony convictions and overruling his motion for a trial on his status as an habitual offender. We affirm.

I. Background Facts and Proceedings.

Based on the evidence in the record, a reasonable juror could have found the following facts: In late September 2007, West Des Moines Detective Daniel Paulson was investigating several residential burglaries in the Des Moines metropolitan area. The targeted victims were all of Asian descent, most were small business owners, and similar items were taken from each home during daytime hours, including jewelry, designer purses, and assorted small electronics. On the afternoon of October 1, 2007, Detective Paulson sent an email message to area officers about several of these burglaries and described the suspect vehicle as a white, newer sport utility vehicle (SUV).

Around 11:30 p.m. on October 1, 2007, Vincent Dinh left his Vietnamese restaurant that had closed at 9:30 p.m. From the restaurant, which was located on Martin Luther King Parkway in Des Moines, Dinh headed by car toward his home in West Des Moines. He noticed a white SUV pull out from the restaurant parking lot at the same time and follow him west on Interstate 235. The SUV

continued to follow Dinh as he proceeded west on the interstate for several miles, and the SUV changed lanes to stay behind Dinh. When Dinh exited and turned north at the Jordan Creek exit, the white SUV continued to follow him. At this point Dinh became so concerned he called his wife and told her to call the police. Dinh then made a u-turn and was able to get the SUV's license plate number, which his wife gave to the 911 dispatcher. Dinh made a few more turns and eventually lost the SUV.

West Des Moines police officers Kraig Kincaid and Daniel Jansen each separately responded to the dispatch about the suspicious SUV. They located the vehicle by its license plate and followed it onto eastbound Interstate 235. Officer Kincaid performed a traffic stop of the vehicle because he believed it was speeding. According to Kincaid, the vehicle was going sixty miles per hour in a fifty-five-mile-per-hour zone at the 5500 block of Interstate 235. After stopping the vehicle, Kincaid spoke to the Asian male driver. The driver gave the false name of Phuoc Nguyen and was not able to provide the officer with a driver's license, registration, or proof of insurance, stating that he left them at home. The driver was later identified as the defendant, Ngo. Officer Kincaid arrested Ngo for speeding and impounded the vehicle.

Officer Jansen testified that he spoke to the Asian female sitting in the back passenger seat of the SUV. She correctly identified herself as Alyssa Sikham. She initially told the officer she did not know where they were going because she had been sleeping. She later stated they were coming from Prairie Meadows Casino, and were going to pick up a friend off 63rd Street in West Des

Moines, but did not know the friend's last name, address, or phone number. The SUV was registered to Sikham's mother.

Des Moines Police Officer Brent Kock arrived on the scene and contacted Detective Paulson. Paulson recognized the names Phuoc Nguyen and Alyssa Sikham and drove to the scene. Paulson commented to Sikham that she was usually with Ngo; however, she claimed she did not know where Ngo was that night. Officer Kock began the impound inventory process on the SUV following the arrest of Ngo. During the inventory he discovered gold jewelry tucked in the gap of the backseat where the seatbelt connectors are located. He also found an iPod and two sets of earphones. When he ran the serial number on the iPod, it was reported stolen.

Detective Paulson planned to drive Sikham home but stopped first at a nearby store to allow her to use the restroom. However, Kock radioed the information regarding the stolen iPod to Paulson, who then arrested Sikham for possession of stolen properly. At the time of her arrest Sikham had on her person a silver necklace and earrings with diamonds, a Bulova watch, a Sony digital camera, a black Gucci purse, and a Louis Vuitton wallet, all items later identified as stolen from four different victims. Sikham denied any knowledge of any burglaries or stolen property. Officers thereafter obtained a search warrant for the SUV.

During the search of the SUV pursuant to the search warrant, officers ultimately found two gold bracelets, a gold heart pendant, a loose diamond, a plastic bag containing ten pieces of jewelry, three watches, a wireless notebook adapter, a DVD player, a cellphone, a camcorder, and an iPod. All items were

identified recently stolen from four different victims and different locations. They also found three additional pieces of jewelry, a crowbar, and a pair of socks inside a duffel bag on the floor of the vehicle behind the driver's seat. Finally, they found a Samurai sword in a sheath on the floor partially under the duffel bag between the front and middle seats.

Sikham's stepfather testified that Sikham had lived with him and her mother up until one month before her arrest, and that she still came and went from their house as she pleased. He verified that Sikham had a relationship with Ngo. A search of Sikham's bedroom in her parents' home revealed two Louis Vuitton purses, three Louis Vuitton wallets, a Seiko watch, and a Samsung camera. The police also found a Motorola "Razr" cellphone in the basement of the home. All of these items were identified as stolen by various burglary victims of Asian descent.

On November 14, 2007, the State charged Ngo and Sikham, by joint trial information, with theft in the first degree, in violation of Iowa Code sections 714.1 and 714.2(1) (2007); conspiracy to commit a felony (third-degree burglary), in violation of sections 706.1 and 706.3; possession of burglar's tools, in violation of section 713.7; and carrying weapons, in violation of section 724.4(3)(a). Ngo filed a motion to suppress on December 13, 2007, alleging there was no probable cause for the stop of the SUV, in violation of the Fourth Amendment of the United States Constitution, and thus all evidence seized as a result of the stop and all statements made by him should be suppressed. Following a hearing, the district court denied the motion. In denying the motion, the court concluded that the criminal police intelligence, together with the call to the police

by Dinh, and the observation by Officer Kincaid of the SUV speeding, provided reasonable suspicion sufficient to support an investigatory stop.

Ngo and Sikham were tried together in a jury trial commencing on February 4, 2008. At trial a couple of Vietnamese ancestry testified their Urbandale home was burglarized late on the afternoon of September 21, 2007, while they were working. When the husband arrived home at 6:00 p.m. that day, he saw an Asian man slowly running from the backyard carrying a suitcase, backpack, and two purses to a larger white vehicle on the street. The husband stated the man jumped in the vehicle and a driver took off. The couple later identified a digital camera and Gucci purse found on Sikham's person, and a cellphone and Louis Vuitton purse and wallet found in Sikham's parents' home, as their stolen property.

A niece and uncle of Laotian ancestry testified that their West Des Moines home was burglarized between 2:30 and 4:00 p.m. on September 27, 2007. The niece discovered the basement window broken and described the house as a "mess." She later identified a wireless adapter, iPod, cellphone, Louis Vuitton purse, and three Louis Vuitton wallets as property stolen from their house. Three of those items were found in the white SUV, three in Sikham's bedroom, and one in her purse. The uncle's Seiko watch was also recovered from Sikham's bedroom.

The son of a next-door neighbor of this family also testified. He testified that while he was pulling into his parents' driveway on September 27, 2007, he observed a white SUV parked in a location in front of his parents' house where there usually is never a vehicle. An Asian woman was sitting in the back. He

also saw a pair of male legs walking through his parents' backyard toward the SUV.

A man of Laotian descent testified as to the burglary of his Des Moines home on September 28, 2007. He discovered the burglary when he arrived home at 4:00 p.m. He later identified a Longines watch and Samsung camera as property stolen from his house. His watch was found in the SUV and the camera in Sikham's bedroom.

A woman of Chinese ancestry testified her Des Moines home was burglarized on September 29, 2007. She testified that when she and her husband returned home from work around 11:00 p.m. they discovered the glass on the back door broken. She later identified a DVD player and silver necklace and earrings with diamonds as stolen property. The DVD player was found in the SUV. Sikham was wearing the necklace and earrings at the time of her arrest.

Finally, a woman of Vietnamese descent testified her West Des Moines home was burglarized during the day on October 1, 2007. She identified a Longines watch, a Relic watch, a Bulova watch, a loose diamond, a gold heart pendant, a gold necklace, two gold bracelets, a plastic bag with ten pieces of jewelry, and a camcorder as items stolen from her home. Sikham was wearing the Bulova watch at the time of her arrest, and Ngo was wearing one of the gold necklaces upon his arrest. The other items were found in the SUV, including two pieces that were found in the yellow duffel bag with the crowbar and socks.

Ngo testified in his own defense. He stated that he and Sikham have had a relationship for more than two years. Both of them had jobs at Kevin's Nails. On direct examination, Ngo explained that after they finished their work shift from

1:00 to 8:00 p.m. on October 1, 2007, they went to Prairie Meadows Casino, then out to eat, and then to look for a friend. On cross-examination, Ngo added that on the evening of the 1st, he had also driven with Sikham to an individual's house to buy gold. Ngo denied following Dinh from the restaurant. Ngo could not recall whether the restaurant at which he and Sikham ate on the 1st was Dinh's. Ngo reiterated that when the SUV was stopped, he and Sikham had been merely looking for an unidentified friend of Sikham's in West Des Moines.

Ngo claimed he had purchased all the property that the burglary victims identified as stolen. He denied knowing it was stolen. Ngo admitted putting some of the property in Sikham's mother's SUV because he often drove it, and putting other property in Sikham's bedroom noting he had a key to the house. He further testified that he was buying many of these items as gifts for his poor relatives in Vietnam. Ngo testified that he gave some of the jewelry to Sikham without telling her where it came from, and hid other pieces from her because he did not want her to know he was planning to send it to Vietnam. He claimed he had borrowed the crowbar from a friend to remove a nail, and that a friend bought him the Samurai sword to use as a decoration in his house.

Ngo admitted to lying to police about his name during the stop. He also admitted on cross-examination to having been convicted of third-degree burglary in 2001 and first-degree theft in 2007. Sikham did not testify.

The jury found Ngo guilty as charged.[1] Ngo filed a motion for new trial, contending the verdicts were contrary to the weight of the evidence. He also filed

[1] Sikham was also found guilty on all counts except the carrying weapons charge. She appealed challenging, in relevant part, the sufficiency of the evidence supporting her

a "Motion for Trial on Defendant's Status as an Habitual Offender." Hearing was held on the motions on March 18, 2008, and the district court denied both, finding there was "ample evidence" to sustain all of the convictions, and that Ngo had been adequately advised of his rights with regard to the habitual offender issue. On the same date the court sentenced Ngo to a term of imprisonment for a period not to exceed ten years on the theft in the first degree charge, enhanced to fifteen years as an habitual offender; five years on the conspiracy to commit a felony (third-degree burglary), enhanced to fifteen years as an habitual offender; one year on the possession of burglar's tools; and two years on the carrying weapons charge. The sentences were ordered to be served consecutively to each other and to a sentence in an unrelated charge.

Ngo appeals his convictions contending: (1) his trial counsel was ineffective for failing during the suppression hearing to challenge the evidence that he was speeding and, absent that evidence, the trial court should have granted his motion to suppress; (2) there was insufficient evidence to support each of his convictions; and (3) the district court erred in accepting his statements regarding his prior felony convictions and overruling his motion for a trial on his status as a habitual offender.

II. Merits.

A. Motion to Suppress.

Ngo's trial counsel unsuccessfully moved to suppress evidence, alleging there was an insufficient basis for the traffic stop. Counsel did not challenge

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convictions for conspiracy to commit burglary and possession of burglar's tools. This court affirmed her convictions on all grounds. *State v. Sikham*, No. 08-0688 (Iowa Ct. App. April 8, 2009).

Officer Kinkaid's statement that one of the reasons he pulled over Ngo was because he was speeding. Ngo contends he was not speeding, that his trial counsel failed in an essential duty for not raising this issue during the suppression hearing, and that he was prejudiced by this failure because the other evidence did not rise to the level of articulable suspicion needed to stop the vehicle.

When there is an alleged denial of constitutional rights, such as an allegation of ineffective assistance of counsel, we evaluate the totality of the circumstances in a de novo review. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). To prove trial counsel was ineffective the defendant must show that counsel failed to perform an essential duty and that prejudice resulted from counsel's error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Doggett*, 687 N.W.2d 97, 100 (Iowa 2004). To prove the second prong, resulting prejudice, the defendant must show counsel's failure worked to the defendant's actual and substantial disadvantage so there exists a reasonable probability that but for counsel's error, the result of the proceeding would have been different. *Doggett*, 687 N.W.2d at 100. Failure to prove either element is fatal to the claim. *Id.* Therefore, we need not determine whether counsel's performance is deficient before undertaking the prejudice determination. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995).

Ngo's challenge to the district court's ruling on a motion to suppress implicates the Fourth Amendment to the United States Constitution.[2] *State v.*

[2] The rights guaranteed by the Fourth Amendment apply to the states through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1694, 6 L.

Otto, 566 N.W.2d 509, 510 (Iowa 1997). We review constitutional issues de novo. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998). In doing so, we make an independent evaluation of the totality of the circumstances as shown by the entire record. *Id*. We give deference to the trial court's findings of fact because of its opportunity to assess the credibility of witnesses, but we are not bound by those findings. *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001). Error was preserved here by the district court's adverse ruling on Ngo's motion to suppress. *Breuer*, 577 N.W.2d at 44.

The Fourth Amendment to the United States Constitution "protects persons from unreasonable intrusions by the government upon a person's legitimate expectation of privacy." *State v. Lewis*, 675 N.W.2d 516, 522 (Iowa 2004). Evidence obtained in violation of this provision is inadmissible in a prosecution, no matter how relevant or probative the evidence may be. *State v. Manna*, 534 N.W.2d 642, 643-44 (Iowa 1995). The Fourth Amendment requires a police officer have reasonable cause to stop an individual for investigatory purposes. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968). "An investigatory stop is considered a seizure within the meaning of the Fourth Amendment and must be 'supported by reasonable suspicion to believe that criminal activity may be afoot.'" *United States v. Ameling*, 328 F.3d 443, 447 (8th Cir. 2003) (quoting *United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744, 750, 151 L. Ed. 2d 740, 749 (2002)).

Ed. 2d 1081, 1090 (1961). Ngo's motion to suppress did not raise any claims under the Iowa Constitution, Art. I, section 8.

> A reviewing court must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing. In forming a basis for suspicion, officers may draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person. While an officer's reliance on a mere hunch is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.

Id. (internal citations and quotations omitted).

Ngo argues that his trial counsel was ineffective for failing to challenge Officer Kincaid's statements concerning the applicable speed limit in the area of the traffic stop. Officer Kincaid testified at the suppression hearing that he pulled over Ngo in part because the white SUV was traveling sixty miles per hour in a fifty-five-mile-per-hour zone. Ngo contends his attorney could and should have verified that the speed limit in that portion of I-235 was actually sixty miles per hour and that Ngo was not speeding.

Assuming without deciding that Officer Kincaid was mistaken about the correct speed limit on that segment of I-235, trial counsel's failure to challenge these statements did not prejudice Ngo. This was only one ground the officer provided for stopping Ngo.[3] There was a sufficient basis for Officer Kincaid to pull over Ngo's vehicle even without the speeding violation. On the afternoon of October 1, 2007, Officer Kincaid received an email bulletin from Detective Paulson regarding a recent residential burglary of an Asian household committed by an Asian couple driving a white SUV. The bulletin also included information

[3] *See State v. Kreps*, 650 N.W.2d 636, 641 (Iowa 2002) ("The test for the stop is an objective one and for that reason the State is not limited to the reasons stated by the investigating officer in justifying the stop.").

regarding a series of past burglaries involving Ngo and Sikham where the *modus operandi* involved following Asian victims from their businesses to their homes and later burglarizing them. This information, combined with Dinh's report of a suspicious white SUV following him from his business after closing near downtown Des Moines all the way to his home in West Des Moines, gave Officer Kinkaid reasonable suspicion that criminal activity may have occurred. Officer Kincaid had a legitimate basis for stopping the white SUV whose license plate matched Dinh's report. *State v. Tague*, 676 N.W.2d 197, 204 (Iowa 2004) (holding whether reasonable suspicion exists for an investigatory stop must be determined in light of the totality of the circumstances confronting the officer, including all information available to the officer at the time of he or she makes the decision to stop the vehicle). "The principal function of an investigatory stop is to resolve the ambiguity as to whether criminal activity is afoot." *State v. Richardson*, 501 N.W.2d 495, 497 (Iowa 1993). Seemingly innocent activities may combine with other factors to give an experienced police officer reasonable grounds to suspect wrongdoing. *State v. Bradford*, 620 N.W.2d 503, 508 (Iowa 2000) (citing *State v. Ceron,* 573 N.W.2d 587, 592 (Iowa 1997)).

Ngo argues that, by itself, the act of following Dinh home would not have constituted criminal activity. That is not correct. The conduct could have constituted an overt act in furtherance of a conspiracy to burglarize Dinh's house. The fact that Dinh may have temporarily thwarted the plan would not eliminate the basis for stopping Ngo. Various cases have held that when a vehicle appears to be "casing" a potential crime target, this provides reasonable suspicion for a traffic stop. *See, e.g., State v. Donnell,* 239 N.W.2d 575, 578

(Iowa 1976) (upholding stop of a van driving slowly through a residential area at 2:00 a.m. when the area had a history of several past break-ins).

In analyzing these kinds of issues, it may be helpful to consider this matter from Dinh's perspective. He operates a Vietnamese restaurant near downtown Des Moines. At 9:30 p.m., the restaurant closed. Two hours later, his chores finally done, Dinh went outside to an otherwise deserted parking lot. He saw a white SUV there, in addition to his own car. Dinh got in his car and began heading home. As Dinh turned on the engine in his car, he looked in his rearview mirror and saw the white SUV also start up. The white SUV tailed him to his home in West Des Moines near Jordan Creek, a distance of approximately ten miles. When Dinh changed lanes, the SUV changed lanes. If Ngo's position were correct, the police would have no basis for stopping the white SUV and making inquiry of its driver—even with the additional information that the West Des Moines police had about recent burglaries, a white SUV, and a *modus operandi* of tailing Asian businesspeople to their homes. We believe it is clear that a reasonable basis for the stop existed.

Accordingly, because the stop of the white SUV was justified even without the speeding violation, we hold that Ngo was not prejudiced by trial counsel's failure to raise any issue with regard to the actual speed limit in that part of I-235. Ngo has failed to meet his burden to demonstrate a reasonable probability that

but for counsel's alleged error, the outcome of the proceeding would have been different.[4]

B. Sufficiency of the Evidence.

We review challenges to the sufficiency of the evidence for the correction of errors at law. *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000). In reviewing such challenges we give consideration to all the evidence, not just that supporting the verdict, and view such evidence in the light most favorable to the State. *Id*. A jury's findings of guilt are binding on appeal if supported by substantial evidence. *State v. Leckington*, 713 N.W.2d 208, 213 (Iowa 2006). If a rational trier of fact could conceivably find the defendant guilty beyond a reasonable doubt, the evidence is substantial. *Lambert*, 612 N.W.2d at 813.

Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury was free to reject certain evidence, and credit other evidence. *State v. Arne,* 579 N.W.2d 326, 328 (Iowa 1998). The credibility of witnesses, in particular, is for the jury. A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive. *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996)*; State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). The very function of the jury is to sort out the evidence and place credibility where it belongs. *Thornton*, 498 N.W.2d at 673.

On appeal Ngo contends there was insufficient evidence to support his four convictions. As we discuss below, a common characteristic of Ngo's

[4] We note that Ngo's Fourth Amendment arguments on appeal are limited to the initial stop. He does not make any challenge either to his arrest or to the searches of the vehicle, independent of his arguments about the initial stop.

sufficiency arguments is that he asks us to credit his testimony, even though the jury was not required to do so.

1. Theft in the First Degree.

In order for the jury to find Ngo guilty of theft in the first degree the State was required to prove, in part, that at the time he exercised control over the relevant property he knew the property had been stolen. *See* Iowa Code § 714.1(4); Iowa Crim. Jury Instructions 1400.13. Ngo contends the State failed to prove this element. In support of this argument he points to the fact it was not his vehicle that contained the stolen property, and to his own testimony that he bought the items at issue as gifts for relatives without knowing they were stolen.

As set forth in detail above, at the time of his arrest Ngo was wearing a stolen gold necklace. Numerous other items recently stolen from four different victims were found in the SUV. One of the four homes had been burglarized earlier that day (October 1). Ngo's version of events was that he had bought all the items from a legitimate source. Thus, to accept Ngo's story, one would have to believe that some of the stolen jewelry had made its way from the victim to a legitimate dealer to Ngo *within the course of a single day*. Ngo produced no receipts or other evidence of these alleged purchases. Making Ngo's story even more implausible was the fact that he initially claimed to have spent October 1 at work, then at Prairie Meadows, then at an unnamed restaurant, and finally on a fruitless search for an unnamed friend. Ngo failed to mention that he had made a purported trip to buy jewelry until he was cross-examined. Ngo's testimony in general was quite vague, and to some extent seemed to be designed to protect his codefendant.

Knowledge may be inferred when a defendant is found in possession of property stolen from two or more persons at different times. *State v. Selestan*, 515 N.W.2d 356, 358 (Iowa Ct. App. 1994). We have much more than that factor present here. Based on the record before us, there is more than sufficient evidence from which a rational jury could reject Ngo's story and find beyond a reasonable doubt that he knew the property he possessed was stolen.

Ngo also alleges the State failed to submit sufficient evidence for the jury to determine that the actual value of the stolen items was more than $10,000.[5] Iowa Code section 714.3 defines the value of stolen property as follows: "The value of property is its highest value by any reasonable standard at the time that it is stolen. Reasonable standard includes but is not limited to market value within the community, actual value, or replacement value." "Value testimony is liberally received, with its weight to be determined by the jury, and rules as to the competency of witnesses on questions of value are 'always liberally construed.'" *State v. Savage*, 288 N.W.2d 502, 504 (Iowa 1980) (citations omitted).

The record reflects that, excluding references to cash and several items that were received as gifts, the victims placed values on their stolen property that collectively exceeded $10,000. "As in a civil suit, an owner is competent to testify concerning the value of his property." *State v. Boyken,* 217 N.W2d 218, 220 (Iowa 1974). The victims' testimony alone was sufficient for the jury to find that the value of the stolen items exceeded $10,000.

[5] Ngo was found guilty of first-degree theft, which requires that the value of the stolen property exceed $10,000. Iowa Code § 714 .2(1).

2. Conspiracy to Commit Burglary.

With respect to the conspiracy charge, the jury was instructed that the State would have to prove the following:

> 1. On or about the first day of October, 2007, the defendants agreed with one another:
>
> a. That one or more of them would commit Burglary in the Third Degree or
>
> b. That one or more of them would attempt to commit the crime of Burglary in the Third Degree.
>
> 2. Each defendant entered into the agreement with the intent to promote or facilitate the commission of Burglary in the Third Degree.
>
> 3. Each defendant committed an overt act toward the commission of Burglary in the Third Degree.

Ngo contends the State did not prove the second and third elements, an "agreement" to promote or facilitate the commission of third-degree burglary and an overt act toward that end. Such an agreement "'need not be formal or express, but may be a tacit understanding; the agreement may be inherent in and inferred from the circumstances, especially declarations, acts, and conduct of the alleged conspirators.'" *State v. Casady*, 597 N.W.2d 801, 805 (Iowa 1999) (quoting *State v. Mapp*, 585 N.W.2d 746, 748 (Iowa 1998)). Because a conspiracy is by nature clandestine, it will often rest upon circumstantial evidence and inferences drawn from that evidence. *State v. Corsi*, 686 N.W.2d 215, 219 (Iowa 2004). We may indulge in "[a]ll legitimate inferences arising reasonably and fairly from the evidence" to support a verdict of conspiracy. *Casady,* 597 N.W.2d at 805 (citation omitted).

Reviewing this same trial record in *State v. Sikham*, No. 08-0688 (Iowa Ct. App. April 8, 2009), we held there was substantial evidence of "a tacit understanding between Sikham and [Ngo] to burglarize Dinh's home." We

reaffirm that conclusion here. Based on all the evidence set forth above including, but not limited to, the presence of both Ngo and Sikham in a vehicle in the middle of the night with a crowbar, socks, and considerable stolen merchandise, the evidence linking them to similar past burglaries, and the fact that they followed Dinh home and then falsely denied that was what they were doing, a reasonable jury could find that a tacit understanding existed between Ngo and Sikham to burglarize Dinh's home. Similarly, a reasonable jury could find that following Dinh home was an overt act in furtherance of that goal.

3. Possession of Burglar's Tools.

The charge of possession of burglar's tools was based on the discovery of a duffel bag containing a crowbar and socks on the floor of the white SUV between the front and middle row seats. In order to find Ngo guilty of possession of burglar's tools the State had to prove Ngo had possession of the crowbar and/or socks and that he intended to use one or both to commit a burglary. Iowa Code § 713.7. Ngo contends the State failed to prove that the crowbar and socks were intended for use in a burglary. "Burglar's tools are implements which, when assembled in combinations have such character as those commonly used to commit the crime of burglary." *State v. Caya*, 519 N.W.2d 419, 422 (Iowa Ct. App. 1994). There were no gym clothes or related equipment in the bag or the vehicle. Instead, the bag also contained a Motorola cellphone, gold pendant, and Relic watch all of which had been stolen from various victims. Detective Paulson testified that, based on his experience and expertise, the crowbar and socks are items commonly used as burglar's tools. More specifically, he stated the crowbar was consistent with some of the burglaries at issue here in that the

September 21, 27, and 29 burglaries were achieved by breaking a screen, a window, and a glass door respectively. He also noted that a burglar may use socks on his or her hands to avoid leaving prints. Ngo gave a less-than-believable explanation for the presence of this large crowbar. He testified that when an unnamed friend had returned the duffel bag to him, he asked the friend if he could borrow a crowbar to remove a nail. This questionable story lends further support to the jury's finding.

Accordingly, we conclude there is sufficient evidence in the record from which a rational jury could find, beyond a reasonable doubt, that Ngo possessed the crowbar and socks with the intent to use them in a burglary.

4. Carrying Weapons.

The jury was instructed that in order to find Ngo guilty of carrying weapons the State had to prove the Samurai sword found in the white SUV was concealed on or about Ngo's person, the blade was in excess of eight inches, the sword was readily accessible to Ngo, and Ngo did not carry the weapon "inside a closed and fastened container or securely wrapped package which is too large to be concealed on the person." *See* Iowa Code § 724.4(3); Iowa Crim. Jury Instruction 2400.3. Ngo challenges only the elements that the sword was readily accessible, and that it was not inside a "closed and fastened container." Ngo testified the sword was given to him as a gift and he planned to use it as a decoration in his house.

The sword was found in a sheath on the floor between the front and middle seats partially under the duffel bag. Detective Paulson testified that someone sitting in the driver's seat of the vehicle could have reached the sword

by putting his or her arm between the front driver's seat and the front passenger seat. Ngo also admitted that he might have been able to reach the sword. Thus, we conclude there was substantial evidence from which a rational jury could find that the sword was readily accessible to Ngo.

We further conclude that a rational jury could find the sheath covering the blade of the sword was not a "closed and fastened container." *See* Iowa Code § 724.4(3)(e). Perhaps surprisingly, a fair amount of Iowa jurisprudence exists on what is a "closed and fastened container." The cane portion of a sword cane is not a "container." *State v. McCoy,* 618 N.W.2d 324, 325-26 (Iowa 2000). An automobile glove box is not a "container," either. *State v. Johnson*, 604 N.W.2d 669, 672-73 (Iowa Ct. App. 1990). However, a zippered gun case is considered to be a "closed and fastened container." *State v. Jones*, 524 N.W.2d 172, 174-75 (Iowa 1994).

Applying the analysis set forth in *Jones*, we conclude that a sheath is *not* analogous to a zippered gun case. Unlike in *Jones*, nothing had to be "unfastened" before someone could wield the weapon. *Id.* at 175. The sword simply had to be pulled out of its sheath.

Ngo argues that the trial testimony was too "speculative or full of conjecture" to determine the nature of the sheath that held the sword. However, Ngo ignores the fact that both the Samurai sword itself and a photograph of it as found in the vehicle were admitted into evidence at trial. Thus, the jury could rely on more than just testimony. So can we. Although the sword itself has not been transmitted to us as part of the record on appeal, we have reviewed the actual photograph that was admitted at trial. It shows that the sword could have been

pulled from the sheath by its handle. Thus, the situation here is not analogous to a handgun in a zippered case. There was sufficient evidence from which a rational jury could conclude that Ngo was guilty beyond a reasonable doubt of carrying weapons.

C. Prior Felonies/Habitual Offender.

Following the jury's verdicts on February 7, 2008, outside the presence of the jury, the district court asked defense counsel how Ngo wanted to proceed on the habitual offender enhancement. The court gave Ngo's counsel an opportunity to speak with his client, telling him he could have as much time as he wanted. After a recess, during which counsel conferenced with Ngo, counsel stated that his client did not desire a trial on the prior offenses. The court then asked Ngo directly if he understood that the basis for the habitual offender enhancement would be the two prior offenses to which he had admitted on cross-examination. Ngo stated he did. The court also identified the convictions at issue by criminal number and date, and asked Ngo if those were his cases and if he had been represented by counsel on them. Ngo answered yes to the court's inquiries. At that point defense counsel agreed no further record needed to be made on the prior felonies.

On March 17, 2008, Ngo filed a "Motion for Trial on Defendant's Status as an Habitual Offender," stating he did not fully understand his rights to a separate trial at the time he advised the court he did not want a trial on the habitual offender issue and was now asking for a trial on that issue. At the hearing on the motion, the court attempted to determine precisely what Ngo wanted to contest. Defense counsel simply stated that Ngo wanted to exercise a right he had

waived "without really thinking it over very carefully" and put the State to its proof. However, defense counsel also reiterated to the court that he had explained Ngo's right to a separate trial on his habitual offender status to him at the time he waived that right. The court denied the motion, concluding Ngo had been adequately advised of his rights and that he had admitted those convictions during cross-examination and stipulated to them after trial.

Iowa Rule of Criminal Procedure 2.19(9) requires the trial court to provide a defendant charged with an habitual offender enhancement an opportunity to admit or deny prior convictions and indicate whether he or she was represented by counsel on those convictions. If the defendant denies the alleged criminal history, the court shall conduct a trial on the issue of identity. Iowa R. Crim. P. 2.19(9). A trial court's abuse of discretion in not complying with rule 2.19(9) does not warrant relief unless it was prejudicial. *State v. Kukowski,* 704 N.W.2d 687, 693-94 (Iowa 2005).

We conclude the district court here fully complied with rule 2.19(9) by giving Ngo an opportunity in open court to affirm or deny that he was the person previously convicted of third-degree burglary in 2001 and first-degree theft in 2007, and to indicate whether he was in fact represented by counsel in those previous convictions. Ngo responded to both inquiries in the affirmative. Furthermore, the record clearly shows Ngo had ample opportunity to speak with his attorney about his rights regarding the habitual offender enhancement. The court had no duty to make any further inquiries beyond those required by the rule, or to allow a full trial on the issue under the circumstances. *State v. Johnson*, ___ N.W.2d ___, ___ (Iowa 2009) (dismissing rule 2.19(9) and

concluding "in the absence of an agreement of the parties to proceed otherwise, the bifurcation procedures explained in [rule] 2.19(9) and in *Kukowski* apply in bench trials and jury trials"). Accordingly, the court did not err in accepting Ngo's stipulation to his prior felonies and denying his motion for a trial on his status as a habitual offender.

III. Conclusion.

For all the reasons set forth above, we conclude Ngo has failed to meet his burden to show a reasonable probability that but for trial counsel's alleged error, the result of the motion to suppress would have been different. Ngo was not prejudiced by the alleged error and the district court did not err in denying his motion to suppress. We further conclude there is sufficient evidence in the record from which a rational jury could find Ngo guilty beyond a reasonable doubt on all four of the charged offenses. Finally, we conclude the district court fully complied with rule 2.19(9) and thus did not err in accepting Ngo's stipulations to his prior felonies and denying his motion for a trial on his status as a habitual offender.

AFFIRMED.