FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed August 30, 1983
vs.)
JAMES JUNIOR BROWNING,) 3-138/68696
Defendant-Appellant.)

Appeal from Linn District Court - Harold J. Swailes, Judge.

Defendant appeals from his convictions for theft in the third degree, in violation of Iowa Code sections 714.1(4) and 714.2(3), and conspiracy in violation of Iowa Code section 706.1. AFFIRMED.

Patrick R. Grady, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Mary Jane Blink, Assistant Attorney General, for plaintiff-appellee.

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

DONIELSON, J.

Defendant appeals from his convictions for theft in the third degree, in violation of Iowa Code sections 714.1(4) and 714.2(3), and conspiracy, in violation of Iowa Code section 706.1. We affirm.

Two women purchased various items of merchandise, including two leather men's coats, at different stores in a shopping mall using checks that had been in a purse stolen earlier that day. A clerk at one of the stores became suspicious when the women could not present adequate identification with the check. A telephone call to the woman upon whose account the check was drawn verified his suspicion that the checks had been stolen, and the clerk called the police. When the women were informed that the store would not accept their check, they immediately left. The clerk followed them out of the mall and observed them getting into a late model white Mercury sedan in which two black men were sitting. The clerk wrote down the license number, and gave that information, along with a description of the automobile and its occupants, to police.

Later that day, police observed a car matching the clerk's description parked at another shopping center. Seated in the car were two women and one man. Defendant was observed walking away from the car, and when apprehended shortly thereafter, he was in possession of a watch that had been in the purse stolen earlier that day. Prior to his apprehension, defendant attempted to flee police, but was discovered in the shopping center hiding in a restroom stall. Several items which had been purchased with the stolen checks were recovered from the car, including the two leather coats.

Defendant was charged with second-degree theft and conspiracy to commit the felony offense of False Use of a Financial Instrument (FUFI). The first charge was reduced to third-degree theft when competent evidence did not exist to establish that the value of the stolen merchandise which defendant exercised

control over exceeded $500. It was necessary to aggregate the value of the coats with the value of the watch in order to establish third-degree theft. Testimony concerning the acts of the two women in cashing the checks at the shopping mall was admitted over objections based upon the lack of evidence of a conspiracy necessary to support introduction into evidence the acts of a co-conspirator. Defendant was found guilty on both counts, and because of his prior criminal record he was sentenced as an habitual offender.

On appeal, defendant asserts: (1) that the evidence of conspiracy was insufficient to support his conviction on that charge; (2) that the trial court erred by admitting into evidence the acts of alleged co-conspirators; and (3) that the evidence was insufficient to show that defendant exercised control over the stolen coats. This being an appeal from a criminal conviction, our review is on assigned error. Iowa R. App. P. 4.

I.

In reviewing claims involving the sufficiency of the evidence, this court views the evidence in the record in the light most favorable to the State, accepting all legitimate inferences which may fairly be drawn therefrom. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). If there is substantial evidence in the record to support the verdict, the jury's verdict is conclusive. State v. York, 256 N.W.2d 922, 927 (Iowa 1977). Evidence is considered to be "substantial" when a reasonable factfinder would accept it as adequate to reach a conclusion. State v. Robinson, 288 N.W.2d 337, 338 (Iowa 1980). We point out that, for purposes of our examination, circumstantial evidence is given the same probative value as direct evidence. The only issue relevant to our determination is whether, upon review of all of the evidence, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979).

Defendant, in one count, was convicted of the crime of conspiracy. Conspiracy is defined by Iowa Code section 706.1 as "an agreement or combination between two or more persons to engage in a course of conduct which will consist, in whole or in part, of criminal acts to be committed by one or more of the conspirators." Defendant argues that because no overt agreement between defendant and the women was proven by direct evidence, and because the State did not prove that he knew that the items in the car were purchased with stolen checks, the evidence was insufficient to sustain a conviction for conspiracy. We do not agree.

It is not necessary for the State to prove by direct evidence an actual agreement to enter into a conspiracy. Circumstantial evidence alone, if probative, is sufficient to sustain a conviction.

> The very existence of a conspiracy is generally a matter of inference deducted from certain acts of the persons accused which are committed in pursuance of an apparently criminal or unlawful purpose in common to them. The existence of the agreement or joint assents of the minds need not be proved directly but may be inferred by the jury from other facts proved.

State v. Schenk, 18 N.W.2d 169, 172, 236 Iowa 178, 184 (1945).

We are of the opinion that the facts established in the present case raise a reasonable inference that a conspiracy involving defendant was afoot. A reasonable jury could have concluded that defendant intended to reap the benefits of the women's stolen check spree from the fact that at least two of the purchases were specifically for men. Clearly defendant, being a male, could not have passed the stolen checks, and his presence with the women might have raised suspicion on the part of the merchants. Moreover, the fact that defendant was in possession of a lady's watch which came from the stolen purse raises the inference that he was an active participant in the entire scheme.

We are not persuaded by defendant's protestations that the State did not

prove that he knew the merchandise was stolen. "[P]ossession of recently stolen property permits the jury to infer the property was received with guilty knowledge . . . . The underlying rationale . . . is that due to the time element involved the possessor must have had either some involvement in or knowledge of the theft. This is a matter of common sense and is clearly rational." State v. Post, 286 N.W.2d 195, 203 (Iowa 1979). In any event, defendant's attempt to flee police raises a strong inference that he knew that illegal activity had been afoot. We are convinced that a rational jury, upon the evidence presented, could conclude beyond a reasonable doubt that defendant had conspired with the two women to commit FUFI.

II.

It is well established that evidence of acts or declarations by alleged co-conspirators done in furtherance of a common purpose are admissible against other co-conspirators. See State v. Dewey, 220 N.W.2d 629, 631 (Iowa 1974). A prerequisite to admission of such evidence is the establishment of a prima facie showing of conspiracy. State v. Paden, 199 Iowa 383, 386, 202 N.W. 105, 107 (1925).

Defendant cites as error the admission of the checks which were used to fraudulently obtain certain items, and admission of the leather coats purchased by the checks, alleging that the State failed to establish a prima facie showing of conspiracy. Because of our holding in division I of this appeal we must hold that defendant's allegation is without merit, and that the evidence was properly admitted.

III.

Defendant's last allegation of error is that the evidence is insufficient to support his conviction of theft in the third degree. Iowa Code section 714.1(4) provides that a person commits theft when he "exercises control over stolen

property, knowing such property to have been stolen, or having reasonable cause to believe that such property has been stolen." Defendant argues that the evidence fails to establish that he exercised any control over the two stolen coats in the car. We do not agree.

The evidence clearly raises the inference that defendant exercised control over the coats. To begin with, the coats were found in the passenger section of the car in which defendant had been riding. The fact that the leather coats were both men's coats warrants an inference that they were "purchased" by the women for the two men in the car. The evidence presented at trial also warranted the jury's conclusion that defendant not only knew that the coats had been fraudulently obtained, but was also involved in the scheme to fraudulently obtain them. (See Division I of this appeal.) Since the jury had concluded that defendant was involved in such a joint venture, it was warranted in concluding that there was joint possession of the merchandise thereby obtained by all those involved in the conspiracy. Defendant's conviction of third-degree theft was therefore not error. Finding no error in the court below, defendant's convictions are affirmed.

AFFIRMED.

All judges concur, except Schlegel, J., and Oxberger, C.J., who dissent.

SCHLEGEL, J. (dissenting)

I respectfully dissent.

At trial the only evidence linking defendant to the alleged conspiracy to commit the felony offence of False Use of a Financial Instrument was his possession of a lady's watch from the stolen purse and his presence in the shopping center parking lot where the two women were apprehended. Conspiracy is an agreement or combination between two or more persons to engage in a course of conduct which will consist, in whole or in part, of criminal acts to be committed by one or more of the conspirators. Iowa Code § 706.1 (1981). It may be established by direct or circumstantial evidence. State v. Jennings, 195 N.W.2d 351, 356 (Iowa 1972). In State v. O'Connell, 275 N.W.2d 197, 204-205 (Iowa 1979), the court eliminated distinctions formerly recognized between direct and circumstantial evidence in testing evidentiary sufficiency. Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). Whether the evidence is direct or circumstantial, however, it must raise a fair inference of guilt; it must do more than create speculation, suspicion, or conjecture. State v. Schrier, 300 N.W.2d 305, 308 (Iowa 1981). I do not believe the evidence as to the conspiracy charge does more than create suspicion and speculation.

The clerk that followed the women out of the mall was unable to identify the defendant. The majority states that "defendant's attempt to flee the police raises a strong inference that he knew that illegal activity had been afoot." The evidence, as to an attempt to flee, is equivocal at best. One police officer testified the defendant returned to the bowling alley upon spotting the police and the arresting officer testified that, upon locating the defendant seated in the restroom, he had to wait a "minute or so" for the defendant to appear. I believe the trial court's initial assessment at the end of the State's case that he didn't "see much hope for [the] conspiracy charge" was accurate. I would hold, as a matter of law, that the evidence was insufficient to support a conspiracy charge.

Because I do not believe that the evidence was sufficient to establish a prima facie showing of conspiracy, I also believe the evidence admitted concerning the conspiracy was erroneously admitted. Moreover, I dissent from the majority's reasoning in division three to the extent it relies upon the existence of a conspiracy to establish control over the stolen coats by the defendant.

Oxberger, C.J., joins this dissent.