IN THE COURT OF APPEALS OF IOWA

No. 3-013 / 92-20

FILED
MAY 01 1993

STATE OF IOWA,

Appellee,

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vs.

JAMES THORNTON, SR.,

Appellant.

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

Thornton appeals from his convictions, following a jury trial, of two counts of first-degree theft and one count of second-degree burglary. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Julie Halligan Brown, Assistant Attorney General, William E. Davis, County Attorney, and Gerda C. Lane, Assistant County Attorney, for appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

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HAYDEN, P.J.

James Thornton, Sr. appeals his convictions, following a jury trial, of two counts of first-degree theft and one count of second-degree burglary. The convictions were based on the following three incidents. On July 30, 1991, Tracy Craig saw a man take her purse from her shopping cart at a Davenport grocery store. On July 31, 1991, Nancy Putnam saw a man grab a bag, which contained her purse, from her car. The man involved in these incidents escaped the victims.

A third incident of theft occurred soon after on the morning of July 31, 1991. Ann Ehrecke had her purse stolen from a church where she and her husband were praying. Daniel and Julie Cutler saw the man run from the church carrying a purse. The man ran to a white car parked near a dumpster. The Cutlers followed the white car and copied the license number. Mr. Cutler then returned to the dumpster and found several purses.

The police discovered the vehicle seen by the Cutlers belonged to James Thornton. Forty-five minutes later, the police stopped Thornton's vehicle. Thornton was the driver and Darnell Hartsfield was the passenger of the vehicle.

Tracy Craig, Eugene Ehrecke, and Julie Cutler identified James Thornton as the thief from a photo array. The State charged Thornton with two counts of first-degree theft and two counts of second-degree burglary. The district court denied Thornton's motion to sever the

counts. At Thornton's request, a line-up was held just prior to trial in November 1991, and several people identified him as the perpetrator.

At trial, the alleged victims and the Cutlers identified Thornton as the thief. The district court, over Thornton's relevancy objection, allowed an officer to testify concerning a stolen checkbook from Illinois found in Thornton's car. Thornton presented an alibi defense and intimated Hartsfield had borrowed his car and committed the thefts.

The district court dismissed one of the second-degree burglary counts. The court refused to instruct the jury on fifth-degree theft as a lesser-included offense of first-degree theft. The jury found Thornton guilty on the remaining counts. Thornton filed a motion for new trial. The district court denied defendant's motion. The court entered judgment and sentenced Thornton to consecutive prison terms of up to ten years on each of the three counts.

Thornton appeals. He contends the district court erred in denying his motion to sever the counts, failing to suppress identification testimony, admitting evidence of a prior bad act, and failing to submit fifth-degree theft as a lesser-included offense of first-degree theft. The State argues, among other things, Thornton failed to preserve error on the severance issue by failing to file a timely

motion to sever. The State also argues Thornton waived any challenges to the line-up composition by failing to object at the time of the line-up.

I. Lesser-Included Offense. The primary issue we address is whether fifth-degree theft is a lesser-included offense of first-degree theft.

Our approach to the lesser-included offense doctrine is set forth in State v. Jeffries, 430 N.W.2d 728 (Iowa 1988). In applying the doctrine, we must ask two questions: what constitutes a lesser-included offense, and when should a trial court instruct on it. Id. at 730. The test for determining whether an offense constitutes a lesser-included offense is whether the greater offense cannot be committed without committing the lesser offense. State v. Turacek, 456 N.W.2d 219, 222 (Iowa 1990); Jeffries, 430 N.W.2d at 730 (citation omitted). By defining a lesser-included offense in this manner, our courts are following the strict statutory-elements approach. Jeffries, 430 N.W.2d at 730.

> This approach simply looks to the elements of the main and lesser crimes as set out by the applicable statutes, rather than to the charge or the evidence. In employing this mechanical approach, a court places the applicable statutes side by side and examines their elements in the abstract.

Id. (citing Janis L. Ettinger, In Search of a Reasoned Approach to the Lesser-Included Offense, 50 Brook. L. Rev. 191, 198-99 (1984)).

The elements of first-degree theft are:

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(1) defendant took possession or control of property;
(2) such property was in the possession of a person;
(3) defendant had the intent to deprive that person of the property; and
(4) the property belonged to that individual.

Iowa Code §§ 714.1(1), .2(1) (1991).

The elements of fifth-degree theft are:

(1) defendant took possession or control of property;
(2) defendant had the intent to deprive the person of that property;
(3) the property belonged to that individual; and
(4) the property did not exceed $50 in value.

Iowa Code §§ 714.1(1), .2(5) (1991).

Thornton contends it is impossible to commit theft from a person without committing theft in the fifth degree. He argues theft from a person requires theft of something of value.

The Iowa Supreme Court has established simple larceny is a lesser-included offense under a charge of larceny from the person. State v. Marshall, 206 Iowa 373, 377, 220 N.W. 106, 107 (1928); see State v. Davis, 236 Iowa 740, 748-49, 19 N.W.2d 655, 659 (Iowa 1945).

> "'To feloniously take from the person of another the goods of that other and carry the same away has always been a crime, punishable as either grand or petit larceny. Therefore, when the legislature defined and made punishable the specific act of feloniously taking property from the person, it did not create a new offense; it but recognized that there were degrees in larceny, some of which were deserving of more severe punishment in proportion to the offense. Larceny from the person, grand larceny, and petit larceny are for this reason but different degrees of the same crime, and are properly included in an information charging the higher offense; and being

> so, it is, of course, proper for the jury, on an information charging the higher offense, to find the accused guilty of any one of the lesser offenses that the facts proven will warrant.'"

Id. at 376-77, 220 N.W. at 107 (citation omitted) (emphasis added). We hold fifth-degree theft, which requires theft of property valued between zero and fifty dollars, is a lesser-included offense of first-degree theft from a person.

The second question we address is when a lesser-included offense instruction should be given. Jeffries, 430 N.W.2d at 730. Our supreme court applies the jury function theory in determining when such an instruction is necessary. Id. at 736. The jury function theory simply requires applying the legal test. The legal test is satisfied if the lesser offense is composed solely of some, but not all, of the elements of the greater offenses. Id. The jury function theory recognizes the factual test is automatically satisfied when the legal test is met. Id. Under this theory the trial court does not review the record to determine whether there is evidence to support a verdict for the lesser offense. Id. at 737.

It appears the district court in this case, however, applied the court function theory, which allows a district court to evaluate the record and determine whether a fact question is generated. Id. at 733. The district court refused to give a lesser-included offense instruction because no evidence of value had been presented at trial.

The application of the court function theory was error. The Iowa Supreme Court specifically rejected the court function theory in Jeffries. Id. at 736.

In applying the jury function theory to this case, we determine a lesser-included offense instruction was warranted. The district court erred in failing to include an offense instruction on fifth-degree theft where the principal charge was first-degree theft. The district court's error warrants a new trial.

We reverse the district court's decision and remand this case for a new trial.

We address the following issues for purposes of judicial efficiency. We trust this will provide guidance in retrial of this case in the event these problems arise again.

II. Severance of Counts. The record shows defendant failed to file a motion to sever until two months after his arraignment. Iowa Rule of Criminal Procedure 10(4) provides a motion for severance "shall be filed when the grounds therefor reasonably appear but no later than forty days after arraignment." Iowa R. Crim. P 10(4). In this case, Thornton was arraigned on September 5, 1991. Defendant, however, did not file a motion to sever until November 8, 1991. Defendant failed to file a timely motion in order to preserve error.

Even in addressing the merits of defendant's allegation, we conclude the district court did not abuse its discretion in denying defendant's motion to sever. Defendant bears the burden of showing "his interest in receiving a fair trial uninfluenced by the prejudicial effects which could result from a joint trial outweighed the State's interest in judicial economy." State v. Lam, 391 N.W.2d 245, 251 (Iowa 1986). Officer Steve Johnson testified he showed photo arrays to victims and witnesses in all three cases. He testified as to each victim's identification of defendant as the perpetrator.

Iowa Rule of Criminal Procedure 6(1) provides in part:

> Two or more public offenses which arose from the same transaction or occurrence or from two or more transactions or occurrences constituting parts of a common scheme or plan may be alleged and prosecuted as separate counts in a single complaint, information or indictment unless, for good cause shown, the trial court in its discretion determines otherwise.

Iowa R. Crim. P. 6(1). The purse snatchings were properly prosecuted in one trial information because they constituted part of a common scheme or plan to enrich defendant. The purse snatchings occurred within a twelve-hour period on July 30 and 31 in the same city.

We affirm the district court on this issue.

III. Identification Evidence. At the start of the trial, Thornton moved to suppress identification testimony. He contended the line-up violated his due process because it was impermissibly suggestive.

Specifically, defendant argues he was the only man in the line-up which fit the victims' description. The State contends defense counsel was present at the line-up and made no objections at that time. The State argues defendant failed to object at the earliest possible time; therefore, the issue was not preserved. State v. Washington, 356 N.W.2d 192, 194 (Iowa 1984).

In analyzing the identification procedures employed, a two-prong test is used: (1) whether the procedure was impermissibly suggestive;" and (2) the suggestive procedure gave rise to a very substantial likelihood of irreparable misidentification. State v. Mark, 286 N.W.2d 396, 403-04 (Iowa 1979) (citing Manson v. Brathwaite, 432 U.S. 98, 109, 116, 97 S. Ct. 2243, 2250, 2254, 53 L. Ed. 2d 140, 151, 155 (1977)).

The victims described their assailant as black, tall, and athletically built. Other individuals included in the line-up fit this description. Those included in the line-up resembled defendant in terms of gender, age, hair style, race, and size. We hold the line-up was not impermissibly suggestive.

In determining whether a very substantial likelihood of irreparable misidentification exists, we focus on whether the identifications were reliable under the totality of the circumstances. The reliability factors are as follows:

[1.] The opportunity of the witness to view the suspect at the time of the crime,
[2.] The witness' degree of attention,
[3.] The accuracy of the witness' prior description of the criminal,

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[4.] The level of certainty demonstrated by the witness at the confrontation, and
[5.] The length of time between the crime and the confrontation.

Mark, 286 N.W.2d at 405 (citations omitted). We apply these five factors to the facts of this case.

Evidence shows the witnesses had an opportunity to view the suspect at the time of the crime. Eugene and Ann Ehrecke were kneeling in a church pew when defendant took Ann's purse from the seat directly behind them. Eugene turned to see defendant take the purse. Defendant was very close to the Ehreckes at this moment and Eugene was able to get a "pretty good" look at defendant. Outside of the church, Julie and Dan Cutler witnessed the escape of defendant. As Dan yelled at the thief to drop the purse, defendant turned and looked directly at the Cutlers. Julie was able to observe defendant's face. This incident occurred during daylight hours. Tracy Craig testified she did not get a real good look at defendant after he took her purse from her grocery cart. She, however, had observed defendant just before the crime occurred. Tracy testified she was only two to three feet from defendant and had gotten a good look at his face. Nancy Putman testified she observed defendant taking her purse from the front seat of her car. Nancy was standing a few feet from her car's front bumper when she observed defendant. She testified when she yelled at defendant, he looked at her and she got a full view of his face.

The witnesses were able to give a sufficient degree of attention to the defendant. From the moment Ehrecke heard a noise behind him, he turned around and focused his attention on defendant in the pew behind him. He continued to focus on defendant until defendant ran from his sight. Tracy Cutler gave a great deal of attention to defendant from the moment she saw him exit the church running and carrying a purse. Both Nancy Putman and Tracy Craig had the opportunity to view defendant's face. All of the witnesses realized what defendant was doing and tried to stop him.

Next, we consider both the level of certainty in the witnesses' identifications and the accuracy of their prior description. The witnesses described defendant as black, tall, and athletically built. The record shows defendant fits the description given by the witnesses. Within two hours of the crime at the church, Eugene Ehrecke and Julie Cutler picked defendant's picture from a six-picture array. Ehrecke took only a couple of seconds and Cutler did not hesitate in selecting defendant's picture. Within two hours after the crime, Nancy Putman also identified defendant as the perpetrator from a photo array. On or about August 7, 1991, Tracy Craig identified defendant as the perpetrator from a photo line-up. She testified she had no problem identifying defendant as the perpetrator. Detective Steven Johnson explained to all of the victims

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and witness they should select a photo only if they were positive he was the perpetrator. Witnesses also identified defendant as the perpetrator at a subsequent line-up.

Finally, the short time span between initial identification of defendant as the perpetrator and the crime also supports a conclusion a substantial likelihood of irreparable misidentification did not exist. Ehrecke, Cutler, and Putman made their identifications within two hours of the crime from a photo array. Although a line-up was conducted, at defendant's request, four months after the crime, Ehrecke and Cutler again positively identified defendant as the perpetrator. We do not find this lapse of time between the line-up identifications and the crime is sufficient to defeat the reliability of the identifications. See Mark, 286 N.W.2d at 406 (citing Neil v. Biggers, 409 U.S. 188, 201, 93 S. Ct. 375, 383, 34 L. Ed. 2d 401, 412 (1972)).

We hold the identifications of Thornton were reliable under the totality of circumstances and properly admitted into evidence. Defendant has failed to satisfy his burden of proof. We determine the trial court did not err in denying defendant's motion to suppress identification testimony. We affirm the trial court on this issue.

IV. Prior Bad Act. Thornton argues the district court abused its discretion in admitting testimony regarding a stolen checkbook which was found in defendant's car at the

time of his arrest. Prior to the admission of the evidence, defendant made a relevancy objection. The district court overruled defendant's objection.

We conclude the district court abused its discretion in admitting this irrelevant evidence. Iowa R. Evid. 402. Iowa Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." Iowa R. Evid. 401. Evidence of the stolen checkbook had nothing to do with any issue in this case; it had no logical tendency to establish any material proposition. State v. Chadwick, 328 N.W.2d 913, 917 (Iowa 1983) (citation omitted). We reverse the district court on this issue.

We reverse the decision of the district court and order a new trial.

REVERSED AND REMANDED.

Sackett, J., concurs; Habhab, J., concurs in part and dissents in part.

HABHAB, J. (concurring in part and dissenting in part)

I concur in Divisions II and III of the majority opinion and dissent as to Divisions I and IV. I would affirm the trial court.

Turning first to the conviction of second-degree burglary, I would decidedly affirm on that issue. Assuming arguendo that the majority is correct on the lesser-included offense of first-degree theft, that does not bear on the second-degree burglary charge. Assuming again that the trial court abused its discretion in admitting testimony regarding a stolen checkbook, I would find that defendant was not prejudiced. Therefore I would affirm the burglary charge.

I confess at the inception that the lesser-included offense contention contained in Division I of the majority opinion, from my standpoint, is not easily resolved. The question, as I see it, is how to apply the legal test where the charge is theft of property from the person of another. This is where I differ with the majority.

The trial court submitted the following two instructions as to counts I and III:

INSTRUCTION NO. 11

> Under Count I, the State must prove all of the following elements of Theft in the First Degree:
>
> 1. On or about the 30th day of July, 1991, the defendant took possession or control of property from the person of Tracy Craig.
>
> 2. The defendant did so with the intent to deprive Tracy Craig of the property.

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3. The property, at the time of the taking belonged to Tracy Craig.

If the State has proved all of the elements, the defendant is guilty of Theft in the First Degree. If the State has failed to prove any one of the elements, the defendant is not guilty under Count I.

INSTRUCTION NO. 15

Under Count III, the State must prove all of the following elements of Theft in the First Degree:

1. On or about the 31st day of July, 1991, the defendant took possession or control of property from the person of Ann Ehrecke.

2. The defendant did so with the intent to deprive Ann Ehrecke of the property.

3. The property, at the time of the taking beloned to Ann Ehrecke.

If the State has proved all of the elements, the defendant is guilty of Theft in the First Degree. If the State has failed to prove any one of the elements, the defendant is not guilty under Count III.

These two instructions were not objected to by the defense. It is clear this case was submitted on the legal theory of theft of property from the person of another.

The part of section 714.2, relied on the by the State for conviction, provides: "[t]he theft of property . . . from the person of another . . . is theft in the first degree." See State v. Washington, 308 N.W.2d 422 (Iowa 1931). As I read that part of section 714.2, when applying it to theft of property from the person, the value of the property does not play a part in determining its violation. This is consistent with the manner in which the case was tried for value of the property did not enter the controversy.

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I conclude that since it does not matter what the value of the property is that is taken from the person of another, the legal test is not satisfied. Accordingly, the trial court was correct in not submitting theft in the fifth degree as a lesser and included offense. I would affirm on that issue.