

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed November 29, 1982

vs.

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2-329
66958-

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GEAMES L. IVORY,

)

Defendant-Appellant.

)

Appeal from Woodbury District Court, James P. Kelley, Judge.

Defendant appeals from his convictions for false use of a financial instrument in violation of Iowa Code section 715.6 and theft in the second degree in violation of sections 714.1(1), and 714.2(2) asserting that the evidence of value was insufficient to support a conviction for theft in the second degree and that testimony should not have been admitted concerning the nature of his previous felony convictions. The State asserts that the objection made at trial was not specific enough to preserve error on the latter issue. AFFIRMED.

Francis C. Hoyt, Jr., Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Steven N. Foritano, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

Defendant appeals from his convictions for false use of a financial instrument in violation of Iowa Code section 715.6 and theft in the second degree in violation of sections 714.1(1) and 714.2 asserting that the evidence of value was insufficient to support a conviction for theft in the second degree and that testimony should not have been admitted concerning the nature of his previous felony convictions. The State asserts that the objections made at trial were not specific enough to preserve error on the latter issue. We affirm.

The defendant, Ivory, and Bobby Walton were jointly tried on charges of false use of a financial instrument, theft in the second degree, and conspiracy. Walton was acquitted on all charges, but Ivory was acquitted only on the conspiracy charge.

Some time after midnight on December 12, 1980, the passbook to John Gearen's savings account at Valley State Bank was stolen from the glove compartment of his car. There were two distinct sets of footprints in the snow leading to the garage where Gearen's car was parked. Gearen's account contained between \$600 and \$650.

Between 8:15 and 8:30 that morning, a black male presented Gearen's passbook and a signed withdrawal slip to a teller at the West 7th Street branch of Valley State Bank. The teller gave this person \$350 in cash. The individual who made this withdrawal was identified as Bobby Walton, who was alone with the teller in the bank.

At 8:40 a.m., a black male, subsequently identified as Ivory, approached a teller at the Sunset Plaza Branch of the Valley State Bank, a mile and a half from the 7th Street branch, and was informed that the bank did not open until 9:00 a.m.

At 8:55 a.m., the office manager of a store next door to the Sunset Plaza branch was informed that a car containing two persons, later identified as Ivory

and Walton, had been circling the parking lot of the plaza. She recorded the license number of the car.

At 9:00 a.m., Ivory entered the Valley State Bank at Sunset Plaza, and presented a signed withdrawal slip on Gearen's account to a teller who gave him \$300 in cash.

There was some conflict in testimony given by certain witnesses concerning the identification of the persons seen at the two bank branches and in the automobile that was circling the plaza. The State's evidence clearly indicated that the thefts were not committed by the same person.

The jury found Walton not guilty on all counts, but found Ivory guilty of false use and of theft in the second degree after finding him guilty of both the \$300 theft at the Sunset Plaza bank branch and the \$350 theft at the West 7th Street branch.

Although he does not contest his conviction of theft at the Sunset Plaza branch, Ivory contends that the evidence does not support the jury's findings, since the State did not prove that he actually committed the \$350 theft at the West 7th Street branch. Without such evidence, Ivory contends that he cannot be convicted of theft in the second degree pursuant to Iowa Code section 714.2(2) and 714.3 (1981). Under section 714.2(2), the jury would have had to find that Ivory had stolen at least \$500 in order to convict him of theft in the second degree. Section 714.3 provides:

If money or property is stolen by a series of acts from the same person or location, or from different persons by a series of acts that occur in approximately the same location or time period so that the thefts are attributable to a single scheme, plan, or conspiracy, such acts may be considered a single theft and the value may be the total value of all the property stolen.

Ivory argues that the State's failure to prove that Ivory actually committed the \$350 theft at the West 7th Street branch precludes his conviction of a charge of theft in the second degree.

I. Scope of Review.

Our review is on assignment of error only. Iowa R. App. P. 4.

II. Sufficiency of the Evidence.

In reviewing a challenge to a sufficiency of evidence on appeal, we examine all the evidence in the light most favorable to the State. State v. Knupp, 310 N.W.2d 179, 182 (Iowa 1981). We will "accept all legitimate inferences reasonably deduceable from the evidence, and uphold an order if there is substantial evidence reasonably tending to support it." Id. "Substantial evidence means such evidence as could convince a rational trier of fact that an element of the crime has been proved beyond a reasonable doubt." Id.; State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).

There was evidence that two people entered Gearen's garage, that two different people signed the withdrawal slips, and that Ivory presented a withdrawal slip at one branch and received money that was withdrawn from Gearen's account. The withdrawals took place within hours of the theft of the passbook; and the first contact at the Plaza branch was just ten to thirty minutes after the first withdrawal at a branch that was located a mile and a half from the Plaza—a five- or ten-minute drive. From these facts, the jury could conclude that two persons were involved in the theft from the Valley State Bank. Since the theft of the passbook and the two withdrawals occurred in close succession, and were evidently committed by at least two persons, and since the two withdrawals were carried out in the same manner, it was reasonable for the jury to infer that the two persons involved in the thefts were working together. Ivory does not contest his conviction of the theft from the Sunset Plaza branch. He claims, though, that since the State produced no evidence that he was inside the West 7th Street branch, he could not be convicted of that theft.

From the evidence presented at trial, the jury could reasonably have concluded that Ivory either aided and abetted or engaged in joint criminal conduct with the person who entered the branch on west 7th street. Conviction of Walton was not necessary to establishment of Ivory's guilt with regard to both thefts if the jury concluded that he aided and abetted the person who carried out the other theft. See State v. Kern, 307 N.W.2d 29, 30 (Iowa 1981); State v. Youngbear, 203 N.W.2d 274, 280 (Iowa 1972); State v. Marsan, 221 N.W.2d 278, 280 (Iowa 1974).

Ivory and Walton were both acquitted of conspiracy. But contrary to Ivory's apparent assumption, conspiracy is not the only way in which two persons may be jointly implicated in a crime. "Aiding and abetting means to assent to or lend countenance or approval to a criminal act, either by active participation in it or by in some manner encouraging it." State v. Jones, 271 N.W.2d 761, 763 (Iowa 1978); Iowa Code § 703.1 (1981). It is not necessary to be at the scene of a crime to be guilty of aiding and abetting, which consists of assenting or lending countenance and approval to the criminal act "either by active participation in it or by some manner encouraging it prior to or at the time of its commission." State v. Kittelson, 164 N.W.2d 157, 161-62 (Iowa 1969), emphasis added; State v. Barnes, 204 N.W.2d 827, 828 (Iowa 1973).

Testimony established that Ivory and Walton were together at the Sunset Plaza branch a few minutes after the theft from the West 7th Street branch. The jury could reasonably conclude that Ivory aided in transporting the thief to and from the West 7th Street branch, and encouraged him to commit the crime. Such a finding is sufficient to establish Ivory's guilt of that theft as well as that which he does not contest.

We find that there was sufficient evidence to convict Ivory of theft in the second degree.

III. Testimony Concerning Defendant's Prior Felony Conviction.

Ivory's motion in limine seeking to prevent the State from making reference to his prior felony conviction at trial was overruled. Prior to cross-examination, counsel for the State sought permission to examine the defendant regarding the nature of his prior felony convictions, and counsel for the defendant objected. Defense counsel's objection at trial was based upon the ground that a prior conviction cannot be used for impeachment purposes when the defendant has admitted the conviction on direct examination. On appeal, Ivory argues that the trial court abused its discretion by allowing introduction of evidence regarding his prior convictions for larceny because admission of such evidence was prejudicial and far outweighed any probative value that it might have had.

To preserve error for appeal, defense counsel must lodge the proper objection when the evidence is admitted. State v. Nimmo, 247 N.W.2d 228, 231, (Iowa 1976). Consequently, error on this issue has been waived. However, even if it had not been waived, the trial court was clearly within its discretion in allowing admission of evidence of a prior felony conviction to impeach the defendant when the felony involved dishonesty or false statements and the court determined that the danger of unfair prejudice was not substantial enough to outweigh its probative value. See State v. Martin, 217 N.W.2d 536, 542 (Iowa 1974); State v. Burt, 249 N.W.2d 651, 653 (Iowa 1977); State v. Miller, 299 N.W.2d 762, 770 (Iowa 1975).

We find, therefore, that there was no abuse of discretion.

AFFIRMED.