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CLERK SUPREME COURT

**IN THE COURT OF APPEALS OF IOWA**

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**STATE OF IOWA,** )

Plaintiff-Appellee, ) Filed February 25, 1987

vs. )

**GREGORY E. JORDAN,** ) 6-487
86-307

Defendant-Appellant. )

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Appeal from the Iowa District Court for Black Hawk County (D7X004941) - L.D. Lybbert, Judge.

Defendant appeals his conviction, following a jury trial, of robbery in the second degree. **REVERSED.**

Charles Harrington, Chief Appellate Defender, and Michael J. Laughlin, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; David L. Dorff, Assistant Attorney General; and Jeffrey Goodman and Michael W. Bucker, Assistant Black Hawk County Attorneys; for plaintiff-appellee.

Considered by Schlegel, P.J., Hayden, and Sackett, JJ.

**SCHLEGEL, P.J.**

The defendant appeals his conviction, following a jury trial, of robbery in the second degree. We reverse.

The defendant was accused of robbery in the second degree in violation of Iowa Code sections 711.1 and 711.3 (1985). At trial, he moved for judgment of acquittal at the end of both the State's and his own case, challenging the sufficiency of the State's evidence. The trial court reserved ruling on both motions. After the jury found the defendant guilty as charged, the trial court overruled his motions for judgment of acquittal and new trial and sentenced him to an indeterminate prison term not to exceed ten years.

On August 18, 1985, a security guard saw the defendant take some jewelry from Donaldson's department store and leave without paying. She followed him and watched him take an escalator to the lower level of the mall and enter Penney's department store. This store is in the same mall as Donaldson's. Rather than following the defendant down the escalator, she entered the upper level of Penney's and took an escalator in the middle of the store down to the lower level. In the lower level of Penney's she again observed the defendant. He had not made any attempt at flight between her loss of visual contact with him and the reestablishment of contact with him. She observed the defendant and actually passed by him.

She did not then confront the defendant. She proceeded out into the mall area. She located another security guard on the upper level. Both guards then went back into Penney's and proceeded down the store escalator. They then approached the defendant and told him that he was suspected of having something in his possession that did not belong to him. During this period, while the security guard was obtaining assistance and returning via the escalator, the defendant did not attempt to leave the premises. As the security guards attempted to

escort the defendant back to Donaldson's, the defendant took exception to his arm being grabbed and a scuffle ensued. After the police arrested the defendant, they recovered the stolen jewelry.

The defendant contends that the trial court erred in overruling his motions for judgment of acquittal where the State failed to produce sufficient evidence that he committed the crime charged. The defendant argues that the theft was completed when he left Donaldson's with the stolen jewelry without confrontation. After this shoplifting, he continues, he entered a period of "temporary safety." Then, when the security guards confronted him, he committed the alleged assault independent of the theft. The defendant maintains that due to the gap between the completed theft and the assault, the State failed to prove that he committed an assault in furtherance of committing a theft or escaping from the scene thereof.

In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State. State v. Mulder, 313 N.W.2d 885, 888 (Iowa 1981), cert. denied Mulder v. Iowa, 459 U.S. 841, 74 L. Ed. 2d 83, 103 S. Ct. 90 (1982). We consider all the evidence, and we may indulge all legitimate inferences arising reasonably and fairly therefrom in support of the jury's verdict. The verdict is binding if it is supported by substantial evidence. State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980). Substantial evidence is that which could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. State v. Mulder, 313 N.W.2d at 888.

Iowa Code section 711.1 (1985) defines robbery in this way:

> A person commits a robbery when, having the intent to commit a theft, the person does any of the following acts to assist or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property:
>
> 1. Commits an assault upon another.

2. Threatens another with or purposely puts another in fear of immediate serious injury.

3. Threatens to commit immediately any forcible felony.

It is immaterial to the question of guilt or innocence of robbery that property was or was not actually stolen.

The jury was instructed as follows:

INSTRUCTION NO. 11:

The law provides that a person commits robbery, when, after committing a theft, he commits an assault to assist or further the person's escape from the scene.

INSTRUCTION NO. 12:

You must find the defendant not guilty of the offense of Robbery in the Second Degree, as charged in the Trial Information, unless the State proves by evidence beyond a reasonable doubt each of the following elements:

1. That on or about August 18, 1985, the defendant committed a theft of the property of Donaldsons Department Store at the Crossroads Shopping Center in Waterloo, Iowa.

2. That having committed the theft, defendant committed an assault upon Robert M. Craft and Tomas Zermino.

3. That he did so to assist or further his escape from the scene.

If you find the State has proved beyond a reasonable doubt each and all of the elements, then you will find the defendant guilty of Robbery in the Second Degree; but, if you find the State has failed to prove beyond a reasonable doubt any one or more of the elements, then you shall find the defendant not guilty.

INSTRUCTION NO. 18:

With respect to the term "to assist or further ones escape from the scene," you are instructed that the assault, if any, need not take place inside or adjacent to the place where the theft, if any, occurred. It is sufficient if the assault, if any, was in the course of or during the escape stage. This includes the time, place and circumstances surrounding the theft, if any.

> The escape stage includes all steps or events in the process of escape which would fall within the active or continuous pursuit of the criminal actor.

It is clear from these instructions that the issue was not whether the defendant had committed an assault to further the theft, but rather if he had done so to further his escape from the scene of the theft. There are no facts to support an assertion that the defendant committed an assault when the theft occurred or that he threatened anyone or purposely put another in fear of serious injury in the act of committing the theft. The defendant admitted to shoplifting and no facts were presented to show that any act of force was used to commit that act of shoplifting. The fighting issue, as is evident from the instructions, is whether the defendant committed an assault in order to further his escape from the scene of the theft.

Our courts have not previously been faced with pinpointing at what precise time an assault after a theft will transform or fail to transform that theft into robbery. Other jurisdictions who have grappled with the issue have not reached uniform conclusions. See Annot., 92 A.L.R.3d 643, 645-53 (1979).

In 1978 the new Iowa Criminal Code went into effect. It was the first complete revision of the criminal code since 1851. Under the new criminal code, common law robbery was enlarged in several ways. For instance, the time span in which the required assault or threat of physical violence must occur was extended from the theft scene through the defendant's escape. Dunahoo, The New Iowa Criminal Code, 29 Drake Law Review 237, 394 (1979-80). Thus, force or intimidation can now occur after the taking of property rather than have to precede or accompany the taking, or attempted taking. Id. Reporters for the committee report prepared for the 1974 Criminal Code Review Study Committee provide, in an unofficial source of legislative history, that robbery as contemplated in section 711.1, involves the threat of immediate [emphasis

added] violence. Yeager & Carlson, Iowa Criminal Law and Procedure 68 (1979). Threats or violence must be done to assist or further the theft or escape from the scene of the crime. Id. at 69. The comments attached to the Criminal Code Review Study Committee emphasize that as regards to defining a crime as a robbery, it is "violence in the commission of the theft which is the gravemen of the offense . . . ." Hence, it follows that the legislature's major concern was with violence accompanying the theft and the immediate flight from the theft, not with an artificial extension of the statute to attenuated assaultive acts of a defendant. This conclusion is substantiated by decisions from other jurisdictions which have interpreted similar robbery statutes. These jurisdictions, in interpreting legislative intent in passing robbery statutes very similar to our own, have stressed that is is the instant or uninterrupted protest or pursuit by the victim which is necessary to permit a defendant's subsequent assault to escalate theft into robbery. For example, in Stufflebean v. State, 436 So.2d 244, 245-46 (Fla. App. 3 Dist. 1983), the court said:

> The state's position, that a robbery occurred because an assault was committed by defendant to prevent the victim's further pursuit after the taking, is clearly supported by Section 812.13(3), Florida Statutes (1981) which provides that: "[a]n act shall be deemed 'in the course of committing the robbery' if it occurs in an attempt to commit robbery or in flight after the attempt or commission." [e.s.]. Section 812.13(3) changes the common law rule that in order for there to be a robbery, violence or intimidation must precede or be contemporaneous with the taking of property, and may not be used only in an effort to escape. . . .
>
> Our view of this case is supported by considerable authority. See People v. Anderson, 64 Cal.2d 633, 51 Cal.Rptr. 238, 414 P.2d 366 (1966) (if one who has stolen property from the person of another uses force or fear in removing the property from the owner's immediate presence, the crime of robbery has been committed); People v. Kennedy, 10 Ill. App.2d 519, 294 N.E.2d 788 (App. Ct. 1973) (while the taking may be without force the offense is robbery if the departure with the property is accomplished by use of force); People v. Sanders, 28 Mich. App. 274, 184

> N.W.2d 269 (Ct. App. 1970) (woman who saw defendant run from her house with her purse and bag of money called for help; her grandson, who pursued defendant, gave up chase when defendant fired a gun); Hermann v. State, 239 Miss. 523, 123 So.2d 846 (1960) (defendants asked service station to fill up gas tank, then displayed a rifle in a threatening manner and drove away without paying); State v. Bell, 194 Neb. 554, 233 N.W.2d 920 (1975) (defendant took cash register from service station while attendant's back was turned, threw it into automobile and attempted to drive off; pursuing attendant stuck his hand through automobile window and was struck and pushed from moving vehicle).
>
> We hold that where an offender gains possession of property of another without force and with intent to deprive the true owner of its use, but the victim gives instant and uninterrupted protest or pursuit in an effort to thwart a taking, and the offender then assaults the victim in order to complete a taking of the property and make good an escape, the offense is robbery. This construction of Section 812.13, supra, we think, is precisely what the legislature intended.

Therefore, by precept and example, the Florida court determined its legislature's intent was to expand the definition of robbery to force used during the instant and uninterrupted protest or pursuit by the victim. The authority cited by the State in the instant case substantiates the necessity that the pursuit be immediate and uninterrupted. Ben v. State, 461 So.2d 286 (Fla. App. 2 Dist. 1985), involved a security guard who was hit by the defendant after the security guard immediately and uninterruptedly pursued a shoplifter. In Wilson v. State, 556 S.W.2d 657, 658 (Ark. 1977), the court said:

> Here the evidence, viewed in the light most favorable to the state, showed that an officer observed appellate conceal a roast in his clothing and clear the check-out line without paying for it when he paid for other items. The officer then approached appellant, told him he was under arrest and advised him that he would have to come with him to the office in the store. On the way appellant broke loose from the officer's restraint. In the ensuing fight, appellant was subdued and handcuffed. The officer suffered an injured back and a broken sternum. The evidence is amply sufficient to establish the elements of robbery as that offense is defined by § 41-2103; i.e.,

> a theft and the employment of force immediately after the theft to resist apprehension or arrest.

In Lightner v. State, 535 S.W.2d 176 (Tex. Ct. Crim. App. 1976), a man who had stolen money from a cash register ran to his car, got in the car and attempted to drive away. A passing policeman gave chase, stopped the car, and was subsequently assaulted. The court said that the offense of robbery:

> . . . [I]ncludes any violence in the course of effectuating the theft as well as any violence while in immediate flight from the scene of the theft. This new definition of robbery proscribes the use of violence not only in the taking of the property, but also in the immediate efforts of the thief to keep the stolen property.

Id. at 177-78. In People v. Estes, 194 Cal. Rptr. 909 (Cal. App. 1 Dist. 1983), a security guard observed the defendant shoplifting. The guard followed the defendant outside the store and confronted him in the parking lot about five feet from the store. The defendant pulled out a knife and threatened to kill the security guard. The court found that this act transformed the theft into robbery because the defendant had not reached a place of relative safety and the assault was committed in furtherance of the robbery. Id. at 912. Therefore, all of the cases cited by the State stress the necessity that the violence take place in the immediate flight from the scene of the theft.

The facts of the instant case clearly reveal that the defendant's escape from Donaldson's department store was finished. The first security guard testified that she lost sight of the defendant for awhile. She testified:

> Q. So you lost sight of the defendant during that period of time, then?
>
> A. Yes.
>
> Q. And as you got down the escalator, did you—When did you catch sight of him again?
>
> A. When I was walking back out towards the mall entrance.
>
> Q. Where was he?

A. He was just coming in.

Q. You went into the lower mall area?

A. Right.

Q. Out the doors from Penney's to the lower mall?

A. Right.

Q. And would have passed Mr. Jordan. Did you pass in the same aisle?

A. Yes.

Q. And nothing was said or done as you passed?

A. No.

Q. Was he stopping and looking at items in the store or what was he doing?

A. He might have stopped once, but that was it. Because we walked by each other.

Therefore, the defendant, when the security guard saw him in Penney's, was not attempting to escape. After she went to get another guard, both guards approached him. The testimony, by the first guard, relating to the defendant's behavior was as follows:

Q. Did you go inside Penney's?

A. Yes, we did.

Q. And then where did you go?

A. We went down the down escalator.

Q. Okay. Again, going crosswise across Penney's?

A. Right.

Q. And when you got to the bottom of the escalator, what then?

A. I saw the subject in the sporting goods department off to the right.

Q. What was he doing there?

A. Looking through merchandise.

Q. So he was not walking towards the exit door or anything when you saw him?

A. No.

Q. He was just looking at merchandise in the sporting goods department?

A. Yes.

Again, the testimony does not support any conclusion that the defendant was any longer in the act of escaping. The security guard accompanying the first guard testified:

Q. Now, if she [the first guard] had followed the defendant to Penney's and left the defendant there for a period of time to come look for someone else, would the defendant have been able to exit or do whatever he wanted during the interim until you returned to Penney's?

A. I would assume so.

Q. He would have been able to, if he'd stolen some jewelry, give it to an accomplice or stash it somewheres or anything of that nature, wouldn't he?

A. Yes, sir.

Q. Or leave the mall area?

A. Yes, sir.

Q. And go hide someplace or go to a different area of the mall until you returned?

A. Yes, sir.

Q. In other words, he'd be free during that period of time, wouldn't he?

A. Yes, sir.

This testimony clearly establishes that the defendant was not in the act of immediate escape. His arrest did not follow directly upon uninterrupted protest or pursuit.

Where there is immediate and uninterrupted pursuit by victims or witnesses of the taking, the risk of injury or death is greatly increased; this is clearly not the same risk as exists with regard to apprehension subsequent to the taking. In this case, the defendant was not immediately and uninterruptedly pursued and he had stopped his escape. No testimony suggests otherwise. Consequently, we cannot uphold defendant's conviction of robbery when the evidence provides no adequate basis for it.

**REVERSED.**

Hayden, J., concurs; Sackett, J., dissents.

I dissent. I would affirm the trial court.