

IN THE COURT OF APPEALS OF IOWA

FILED 382

DEC 30 1981

CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

Filed December 30, 1981

vs.)

SAMUEL DEAN COOK,)

1-371
66062

Defendant-Appellant.)

Appeal from Black Hawk District Court - George L. Stigler, Associate District Judge.

Defendant appeals from his conviction of theft in the third degree, in violation of section 714.2(3), The Code, based on his aiding and abetting another in the commission of that crime, asserting: (1) there was insufficient evidence to support a finding of guilt; and (2) trial court erred in allowing an expert witness to express an opinion that the facts in the case fit the normal pattern of "till tapping." AFFIRMED.

Charles L. Harrington, State Appellate Defender's Office, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Thomas Martin, Assistant Attorney General, for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant, Samuel Dean Cook, appeals from his conviction of theft in the third degree, in violation of section 714.2(3), The Code, based on his aiding and abetting another in the commission of that crime. Defendant asserts: (1) there was insufficient evidence to support a finding of guilt; and (2) trial court erred in allowing an expert witness to express an opinion that the facts in the case fit the normal pattern of "till tapping". We affirm.

On April 8, 1980, defendant was charged by county attorney's information with theft in the third degree in violation of section 714.2(3), The Code. On July 22, 1980, the defendant appeared before trial court and waived his right to a trial by jury; the case proceeded to trial to the court at that time. At the close of the State's case, the defendant made a motion for acquittal due to the State's failure to present evidence establishing defendant's involvement in the crime beyond a reasonable doubt. Trial court overruled the motion and defendant rested without testifying on his own behalf.

The following facts were revealed by the evidence in this case: At approximately 9:00 a.m. on March 31, 1980, a money bag was discovered missing from the office safe at the Montgomery Ward auto center in Cedar Falls. The manager of the auto center testified that he gave the name of one Tyrone Starks to the police as a possible suspect. Starks was a former employee of the auto center, whose duties had included removing a bag containing money from the cash register from the office safe each morning. The manager testified that "there should have been \$527" in checks and cash in the money bag at the time it was found missing. However, he admitted that he had not actually examined the contents of the bag. The safe had been opened by another employee at the auto center, after that employee had arrived at work at 7:45 a.m. According to this employee's testimony, defendant came into the store between 8:05 a.m. and 8:10 a.m. on March 31st and stated that he wanted to look at some tires for a Jeep that he owned. The employee showed him some Jeep tires which were located in the corner of the store from which the offices were not visible. Defendant left without purchasing any tires and got into the passenger side of an automobile in the store parking lot. The employee testified that he could not see who was driving the car. An officer testified that Starks was arrested in connection with the crime, but Starks was not called as a witness, nor was any evidence admitted regarding his participation in the offense. The officer did testify concerning statements made by defendant during a custodial interrogation. According to this officer, defendant stated that Starks was giving him a ride to school

on the morning of March 21, 1981, when defendant decided he wanted to look at tires at Montgomery Wards for a Jeep he was planning to purchase. Starks drove defendant to Montgomery Wards and told defendant that he would be at another store in the vicinity while defendant was looking at the tires. When defendant was finished at Montgomery Wards, Starks drove him to school. Defendant related that he had seen a "green bank bag" in the car after he left the Montgomery Wards store. He admitted that Starks had given him \$20 in payment of a debt, but could not recall if the money had come from Starks' pocket or the money bag. The defendant denied receiving any other money from Starks and denied knowing the amount of money that was in the bag. The defendant also told the officer that he (defendant) had been informed by a relative of Starks' arrest, but the officer considered this to be inconsistent with defendant's statement that he knew what had happened once he got back in the car and observed the green bag with the words "Montgomery Wards" printed on it. The officer was allowed to testify, over defendant's objection, that in his opinion the facts which he had learned with regard to this case were consistent with the normal pattern of a till tapping crime. On this evidence, the court found defendant guilty of aiding and abetting another in the theft of money from the Montgomery Wards store. This appeal followed.

I. Scope of Review. Since this is an action at law, our review is for correction of errors only. Iowa R. App. P. 4.

II. Sufficiency of the Evidence. When sufficiency of the evidence is challenged, we review the evidence in a light most favorable to the State, taking into consideration all evidence in the record. State v. Kern, 307 N.W.2d 22, 28 (Iowa 1981); State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). On factual issues, the credibility of witnesses and the weight to be given to their testimony is for the trier of fact. State v. Cott, 283 N.W.2d 324, 329 (Iowa 1979). A trial court's refusal to direct a verdict for a defendant will withstand challenge if there is any substantial evidence in the record tending to support the charge. State v. York, 256 N.W.2d 922, 927 (Iowa 1977). Similarly, a factfinder's verdict of guilty is binding upon this court unless there is no substantial evidence in the record to support it or such finding is clearly against the weight of the evidence. State v. Overstreet, 243 N.W.2d 880, 884 (Iowa 1976). Substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. Robinson, 288 N.W.2d at 339.

The record is devoid of any evidence which would establish that the defendant took the money from the safe at the Montgomery Wards store. Trial court noted that this case was tried on a theory that defendant aided and abetted another in the theft. The underlying concept of aiding and abetting is the requirement that the defendant in some way associate himself with the venture, participate in it as something he wishes to bring about, and seek by his action to make it succeed. State v. Lott, 255 N.W.2d 105, 108 (Iowa 1977). However, defendant may not be convicted as a principal on the theory of aiding and abetting unless it is shown "he assented to or lent countenance to [his accomplice's] criminal act by some manner encouraging it prior to or at the time of its commission. Knowledge is essential, but neither knowledge nor mere proximity to the scene of the crime is sufficient in itself to prove aiding and abetting." State v. Vesev, 241 N.W.2d 888, 891 (Iowa 1976).

With these principles in mind, we conclude, after reviewing the entire record, that trial court's verdict is supported by substantial evidence. First, we conclude that the defendant's statement (that he arrived at the store with Starks, and saw a green money bag with the name Montgomery Wards stenciled or printed on it in Starks' car), coupled with the fact that shortly after defendant's departure from the store a money bag was discovered missing, supports the inference that a theft was committed by Starks while defendant was in the store. In light of that theft, defendant's act of directing the attention of a store employee to a far corner of the store from which the office was not visible supports a reasonable inference that this act was a diversionary tactic used to enable Starks to accomplish the theft. We decline to accept defendant's invitation to view these acts in isolation and accept only an inference of innocence from their occurrence. Viewing the evidence as a whole, under the totality of the circumstances, and taking all reasonable inferences in favor of the State, we believe trial court's verdict is supported by substantial evidence.

III. Opinion Testimony. Defendant's second complaint is that trial court erred in allowing an expert witness to express an opinion that the facts in this case fit the normal pattern of "till tapping." He argues that the facts upon which the opinion relied were not sufficiently stated and that the opinion was based, at least in part, on inadmissible hearsay. We find no merit to this argument because we do not believe that defendant's objection adequately apprised trial court of the grounds for defendant's objection. At trial, the following colloquy took place:

Q. Now, from the facts that you learned with regard to this case, do the facts in this particular situation learned from your investigation, do they fit the normal pattern of a till tapping type of crime?

MR. DAVIDSON: I object to that, your Honor. First of all, it's talking about facts not necessarily in evidence. He's asking for a speculative answer from the witness.

THE COURT: I will allow the witness to express an opinion, but he will not be allowed to express an opinion on the ultimate issue, the ultimate fact at issue here...

"Generally, objections to opinion evidence must be specific, pointing out in what particulars the complaining party believes the foundation to be insufficient." State v. Hummell, 228 N.W.2d 77, 82 (Iowa 1975). We conclude that the objection in this case does not meet the standard of specificity. Defendant did not apprise the court of what assumed facts were not in evidence and what assumed facts were based on hearsay testimony. Nor did he point out in what respects the foundation was insufficient if such assumptions were disregarded.

In conclusion, we find no error in trial court's rulings or verdict and affirm its decision.

AFFIRMED.