IN THE COURT OF APPEALS OF IOWA

No. 0-705 / 90-183

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

ALBERT KING PLEDGER,

Appellant.

STATE OF IOWA,

Appellee,

vs.

ISOM JOSEPH MOORE,

Appellant.

Appeal from the Iowa District Court for Scott County, David J. Sohr, Judge.

Defendants were accused of participating in a shoplifting spree. Following a joint jury trial, they were both convicted of second-degree theft. They appeal their convictions, and the two appeals have been consolidated. Defendants contend the district court should have suppressed evidence seized from their car. They also challenge the admission of alleged hearsay testimony and the sufficiency of the evidence to support their convictions. **AFFIRMED.**

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

Bonnie J. Campbell, Attorney General; Thomas S. Tauber, Assistant Attorney General; William E. Davis, County Attorney; and Michael J. Walton, Assistant County Attorney, for appellee.

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

DONIELSON, P.J.

On October 1, 1989, an employee of the Penney's store in the Northpark Mall (Davenport, Iowa) became suspicious when she observed Albert Pledger standing behind her cash register counter. In one hand Pledger held a new Penney's shirt, still on its hanger, and with the other hand he was trying to pull a large plastic Penney's bag out from under the counter. As the employee approached Pledger, Pledger put the shirt back on the rack but he took a large bag, claiming that his bag had torn and he needed the bag (Pledger had no other bag or packages with him at the time). The Penney's employee believed Pledger had been trying to steal the shirt and alerted security personnel.

The Penney's security officer, McVey, considered the taking of the bag suspicious because shoplifters sometimes use such bags to conceal and transport the merchandise they steal from stores.[1] As McVey and the employee were talking, the employee saw Pledger walk past the store together with another man, who was later identified as Isom Moore. The employee pointed out Pledger to McVey. McVey then followed the two men out of the mall. One of the men was carrying a large white shopping bag. McVey saw Pledger

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1. The Penney's employee later testified that employees are allowed to give bags to customers if they have a bag that is torn, with merchandise in it and a receipt. If someone just wants a bag and they don't have anything with them, employees are not allowed to give bags.

and Moore get into their car and drive out of sight around the mall, past the Sears store.

McVey called the Penney's telephone operator and asked her to have a mall security officer meet him at a specific mall entrance. As McVey waited at the mall entrance, he saw Pledger and Moore's car reappear from behind Sears. The car stopped at another mall entrance, Moore exited the car and entered the mall, again carrying the white shopping bag McVey had seen before. The bag appeared to have a box inside with approximate dimensions of 2-1/2 feet by 2-1/2 feet. Pledger then parked the car and also reentered the mall.

Mall security officer Sagers met McVey. McVey explained the situation and Sagers realized he had seen the same two men McVey had been watching. Two off-duty police officers, Lindbom and McCollum, who were working as security officers also joined McVey and Sagers. McVey and Sagers described what they had seen.

Pledger and Moore were subsequently observed from the mall parking lot and from within the mall. They were observed entering the mall several times and returning to their car several times, always with the white bag. The car was moved at least twice more. On one of the trips to the car, Sager and McVey observed Pledger open the trunk and Moore upend the bag, dumping what looked like clothing from the bag into the trunk. Sagers noted the bag retained

its shape during this process--apparently a box remained inside.

Sagers reported these observations to the two off-duty police officers. Upon hearing that Pledger and Moore were dumping what looked like clothing from the bag into the trunk of their car, Lindbom suspected that they were using a shoplifting device called a "drop box."[2] He had learned of the device during his police training. Sagers also knew of drop boxes because he had seen them before and had been involved in a case in which the suspects made use of such a device. It was at this point Lindbom decided to stop Pledger and Moore.

When Pledger and Moore appeared to be about to drive away from the mall, Lindbom radioed a marked police car and told the officers to stop the defendants' vehicle. Upon being stopped, Pledger exited the vehicle and was immediately arrested for fifth-degree theft based on the taking of the Penney's bag. Lindbom then walked toward the car where Moore remained seated. In the back seat Lindbom saw the large white shopping bag the security officers had seen before. Inside the bag Lindbom could see a large cardboard box wrapped in aluminum foil. Also, Lindbom could see articles of clothing on hangers and with tags

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2. Apparently, the "drop box" (a hinged box inside a bag) gives the appearance the bag is full even when empty. A hinged lid is used so persons looking into the bag see a closed box. Aluminum foil wrapping may be used and is intended to defeat electronic security tags.

still attached inside the "drop box." Lindbom believed at this point that the bag contained stolen clothing, because the mall's clothing stores usually remove hangers and at least half of the price tag when clothing is legitimately purchased. Moore was taken out of the car and placed under arrest for second-degree theft. Upon request, Moore gave Lindbom the key to the trunk of the car.

A search of the car revealed merchandise from several stores which appeared not to have been purchased: no sales receipts were found, clothing was found still on hangers and with tags attached, clothing from one shop was found in bags bearing another shop's name, and one jacket still had an electronically-activated security tag on it.

Pledger and Moore were charged with second-degree theft. After a joint jury trial, Pledger and Moore were both convicted of second-degree theft. They appealed their convictions, and the two appeals have been consolidated. Defendants contend the district court should have suppressed evidence seized from their car. They also challenge the admission of alleged hearsay testimony and the sufficiency of the evidence to support their convictions.

I. **Search.** Pledger and Moore contend the district court should have suppressed the items seized from their car following the warrantless stop and search of the car. They argue the officers had no reasonable cause to stop the car. Also, defendants contend that if the police stopped

the vehicle to arrest Pledger on charges stemming from the theft of the Penney's bag, the stop was merely a pretext.

When a defendant is alleging error involving a constitutional right, such as here, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987).

The fourth amendment requires reasonable cause to stop a vehicle for investigatory purposes. Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed.2d 899, 906 (1968). When a stop is challenged on the basis that reasonable cause did not exist, the State must show that the stopping officer had "specific and articulable cause to support a reasonable belief that criminal activity may have occurred." State v. Lamp, 322 N.W.2d 48, 51 (Iowa 1982) (quoting State v. Aschenbrenner, 289 N.W.2d 618, 619 (Iowa 1980)). The officer is bound by the true reason or reasons for making the stop; the officer may not rely on reasons that he or she could have had but did not actually have. Aschenbrenner, 289 N.W.2d at 619.

Relying on Aschenbrenner, defendants contend the stop of the vehicle in order to arrest Pledger for the theft of a fifteen-cent Penney's bag was merely a pretext to search the car to determine whether the defendants had been shoplifting other merchandise and, therefore, evidence obtained from the search should have been suppressed.

Defendants, however, concede the recent case of State v. Garcia, 461 N.W.2d 460 (Iowa 1990), directly impacts the search and seizure issue. In Garcia, our supreme court addressed pretextual arrests.[3] Defendant Garcia challenged his arrest for driving without a license as a pretext for searching his vehicle for drug evidence. In Aschenbrenner, our supreme court adopted a subjective test to be used when a defendant challenged a search as pretextual: "Officers are bound by their true reason for making the stop. They may not rely on reasons they could have had but did not actually have." 289 N.W.2d at 619. The Garcia court noted, "Even applying this subjective standard, the arrest was proper because the officers did have proper, albeit a secondary, reason for the stop. Officers may have multiple reasons for making a stop . . . ." 461 N.W.2d at 464. The Garcia court then concluded, "Because the officers had grounds to stop the car and make the arrest because of Garcia's failure to have a valid driver's license,

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3. "[A] pretextual arrest occurs when the police employ an arrest based on probable cause as a device to investigate or search for evidence of an unrelated offense for which probable cause is lacking." United States v. Trigg, 878 F.2d 1037, 1039 (7th Cir. 1989). Traditionally, this police tactic has led to the suppression of all evidence derived from the search incident to the pretextual arrest. Garcia, 461 N.W.2d at 463. More recently, courts appear to limit inquiry to objective factors: (1) Did the arresting officer have probable cause to believe that the defendant had commmitted or was committing an offense? (2) Was the arresting officer authorized by state or municipal law to effect a custodial arrest for the particular offense? Id.

we believe the search which was incidental to the arrest was also proper." Id.

Defendants Pledger and Moore do not seriously challenge the legality of Pledger's arrest.[4] The officers had grounds to stop Pledger and Moore's car because of Pledger's theft of the bag. Because there was ground to stop the car and arrest Pledger, the officers could legitimately search the passenger compartment of the vehicle. State v. Sanders, 312 N.W.2d 534, 539 (Iowa 1981) (adopting the rule of New York v. Belton, 453 U.S, 454, 460 (1981)). Furthermore, Moore gave the trunk key to the officers, thus consenting to the search of the trunk. State v. Shane, 255 N.W.2d 324, 326 (Iowa 1977) (voluntary consent waives warrant requirement). The district court did not err in refusing to suppress the evidence obtained from the search of defendants' vehicle.

II. **Hearsay.** Pledger and Moore next contend the district court erred by admitting several items of hearsay testimony. The alleged hearsay arose during the testimony of several employees of stores in the mall who testified that information obtained from still other employees supported the conclusion that certain pieces of merchandise found in the car had been stolen.

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4. While defendants argue that the taking of a 15 cent bag would not normally lead to arrest, they do not and cannot argue the taking of the bag was not, in fact, a theft.

Specifically, defendants challenge the questioning of three witnesses. However, we only need address the questioning of one witness, Donald Simmons, because no hearsay was elicited from either Heather Ybanez (an employee of Chess King) or Kevin Kern (an employee of Eby's Sporting Goods).[5] During the State's direct examination of Donald Simmons, a Radio Shack employee, the following questions concerning a missing display telephone recorder occurred:

> Q. Was it possible that that phone was sold that day [October 1, 1989]? A. No. I asked the other salesman.
> MR. SMITH [defense counsel]: Objection, Your Honor. He's testifying to hearsay at this point.
> THE COURT: Objection is overruled.
> THE WITNESS: I asked the other salesman if he had sold it, and he said, no, he hadn't.
> MR. SMITH: Objection, Your Honor, it's hearsay.
> THE COURT: Objection is overruled.
> THE WITNESS: And he said, no, he hadn't. So there was only a couple of things that could have happened to it. I didn't sell it. There was only two of us there that day.
> BY MR. WALTON [prosecutor]: Q. So, to your knowledge, that phone was not sold that day? A. No, it wasn't.
> Q. Yet it was missing from the store that day? A. Yes, it was.

Defendants assert the trial court erred in its rulings.

We first note that the first objection came before any out-of-court statement was elicited and, consequently, was

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5. Objections based upon lack of personal knowledge may have been appropriate with regard to the questioning of these two witnesses. Iowa R. Evid. 602. However, defendants objected only on grounds of hearsay, failing to preserve error for appeal. See State v. Lyon, 223 N.W.2d 193, 194 (Iowa 1974).

properly overruled. Any error involving the second objection was not preserved for review.

> Objections to evidence must be raised at the earliest time the alleged ground becomes apparent. [citations omitted] When, as in the present case, an objection is late and follows the answer, a motion to strike and an application to have the objection precede the answer, or an excuse for the tardy objection, must be made in order for the objection to preserve error. [citations omitted] Since defendant made no motion to strike, did not apply to have the objection precede the answer, and gave no excuse for the delay, the objection made after defendant answered was inadequate to preserve error.

State v. Sharkey, 311 N.W.2d 68, 71 (Iowa 1981) (emphasis added). Because defendants made no motion to strike, did not apply to have the objection precede the answer, and gave no excuse for the delay, the objection made after the witness answered was inadequate to preserve error.

III. **Sufficiency of Evidence.** Finally, Pledger and Moore challenge the sufficiency of the evidence to support their convictions. They contend there was no direct evidence that any of the items had been stolen rather than purchased. They note no one saw them steal any of the items. They argue the circumstantial evidence concerning such matters as packaging and the presence or absence of hangers and sales slips was not sufficient to prove theft beyond a reasonable doubt. They also assert that in several cases the evidence did not even establish an item came from a Northpark Mall store rather than a different store of the same chain or brand.

The standard of review in challenging the sufficiency of the evidence is well established. State v. Lampman, 342 N.W.2d 77, 81 (Iowa App. 1982). We will uphold a verdict where there is substantial evidence in the record tending to support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the state, including legitimate inferences and presumptions that fairly and reasonably may be deduced from the evidence in the record. State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985); State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). It is necessary to consider all the evidence in the record, and not just the evidence supporting the verdict, to determine whether there is substantial evidence to support the charge. Hall, 371 N.W.2d at 188; Bass, 349 N.W.2d at 500. Substantial evidence means evidence which would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. Hall, 371 N.W.2d at 188; State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984).

We have already summarized the record and will not repeat it here. In considering the Penney's employee's

observation of Pledger with the shirt and bag in hand, the drop box, the many trips into and out of the mall, the eyewitness descriptions of Pledger and Moore dumping clothing from the drop box into the trunk of the car, and the complete absence of any evidence the merchandise was legitimately purchased, the cumulative weight of this evidence was sufficient to convince a rational fact finder that defendants were guilty beyond a reasonable doubt. The verdicts against defendants are supported by substantial evidence and we must uphold them.

For all the forgoing reasons, defendants convictions are affirmed.

AFFIRMED.