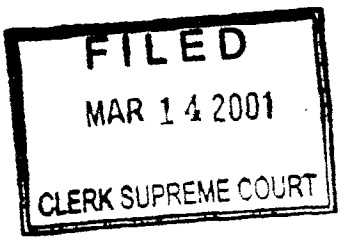
IN THE COURT OF APPEALS OF IOWA

No. 0-634 / 00-0106
Filed March 14, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES EDWARD HEARD,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers, Judge.

James Heard appeals his conviction and sentence following a bench trial for robbery in the second degree in violation of Iowa Code sections 711.1 and 711.3 (1999). Heard contends (1) the trial court erred in basing a finding of assault on conduct that took place outside the presence of the alleged victim, (2) a trier of fact should be required to draw inferences in favor of innocence where the facts reasonably support alternative inferences, and (3) the evidence was insufficient to support the findings that he committed an assault and that he threatened immediate serious injury. **REVERSED.**

Brett A. Nelson and William E. Blais of Nelson, Keys & Keys, P.C., Rock Island, Illinois, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, William E. Davis, County Attorney, and Jerald L. Feuerbach, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Zimmer and Miller, JJ.

MILLER, J.

The defendant, James Edward Heard, appeals his conviction and sentence following bench trial for robbery in the second degree in violation of Iowa Code sections 711.1 and 711.3 (1999). Heard contends the trial court's findings of assault and threat were erroneous, a trier of fact should be required to draw inferences in favor of innocence where the facts reasonably support alternative inferences, and there was insufficient evidence to support the verdict. We reverse.

I. BACKGROUND FACTS AND PROCEEDINGS

In the early morning hours of May 29, 1999 Aimee Hahn was working alone at a Coastal Mart store in Davenport, Iowa. At approximately 4:20 a.m. Hahn noticed a person with a bag over his head walk past a small window and enter the store. Hahn testified the man said either "Happy Halloween" or "Trick or Treat" as he came into the store. The man was wearing a paper bag over his head with large, heavy safety-type glasses under the bag and athletic socks over his hands. He stood across the counter from Hahn, about three to three and half feet from her, and told her to "give him the money" in a soft voice. Hahn asked the man to repeat himself and then opened the cash drawer and handed over approximately $110. The man then told Hahn to give him the money from under the drawer, which she did. He asked if there was any more money in the store. Hahn lied and said there was not. The man then told Hahn to lie on the ground and she did. After she believed the man had left the store Hahn called 911. Hahn testified the entire incident lasted approximately 30 seconds. On cross-

examination Hahn stated that the man made no physical movement toward her nor did he make any express verbal threats of harm.

Within minutes a police officer stopped a pickup truck Heard was driving. Hahn was brought to the scene of the stop and identified Heard. Heard was arrested and charged with second-degree robbery and first-degree theft.[1] Prior to trial the court granted the State's oral motion to withdraw the first-degree theft charge. The matter proceeded to bench trial on the robbery count. At the close of the State's evidence Heard made a motion for judgment of acquittal which the trial court denied. The court found Heard, while intending to commit a theft and to further the commission of the theft or escape from the scene, had committed an assault on Hahn under Iowa Code section 708.1(2) and found him guilty of second-degree robbery in violation of Iowa Code sections 711.1(1) and 711.3. In the alternative to an assault, the court also found that Heard had threatened Hahn in a manner which would put her in fear of immediate serious injury and found him guilty of robbery in the second degree under sections 711.1(2) and 711.3.

Heard subsequently filed an application for new trial arguing the evidence did not support the finding of an assault or a threat. The trial court denied the application and sentenced Heard for a term of not more than ten years. Heard appealed.

II. STANDARD OF REVIEW

We review challenges to sufficiency of the evidence supporting a guilty verdict for errors at law. Iowa R. App. P. 4; *State v. Randle*, 555 N.W.2d 666,

[1] The facts surrounding Heard's identification and apprehension are not at issue on appeal.

671 (Iowa 1996). A trial court's findings of guilt are binding on us if supported by substantial evidence. *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000); *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997); *see also* Iowa R. App. P. 14(f)(1). If a rational trier of fact could conceivably find the defendant guilty beyond a reasonable doubt, the evidence is substantial. *Lambert*, 612 N.W.2d at 813. The evidence is examined in the light most favorable to the State, including all legitimate inferences and presumptions which may be fairly and reasonably deduced from the record. *Id*; *State v. Simpson*, 528 N.W.2d 627, 632-33 (Iowa 1995). We consider all evidence presented, not just that of an inculpatory nature. *Randle*, 555 N.W.2d at 671. Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). However, evidence that only raises suspicion, speculation or conjecture is not substantial. *Thomas*, 561 N.W.2d at 39. The State is required to prove every element of the crime beyond a reasonable doubt. *State v. Wilkens*, 346 N.W.2d 16, 20 (Iowa 1984); *State v. Trammell*, 458 N.W.2d 862, 863 (Iowa App. 1990).

III. MERITS

Heard contends that to support a finding of assault there must be an overt act, and because he placed the paper bag over his head and socks on his hands outside the presence of Hahn there was no overt act here. He further argues his appearance alone could not constitute an implied threat and if an inference is to be made from the fact he disguised himself it must be that the disguise was to shield his identity, not that he was threatening Hahn. Therefore, he asserts there was insufficient evidence to support the trial court's finding of an assault or threat.

Under Iowa Code section 711.1 a person commits robbery when, "having the intent to commit a theft," the person does any of the following acts to further the theft or escape from the scene of the theft:

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.

Iowa Code section 708.1(2) provides a person commits assault when, without justification, the person does any of the following:

> Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.

The trial court found Heard guilty of robbery in the second degree as defined under section 711.1(1) and, in the alternative, under section 711.1(2). The court found Heard entered the Coastal Mart with the purpose of committing a theft of cash and thereupon committed an assault on Hahn.[2] The court stated, "[s]pecifically, the defendant committed acts intended to place the clerk in fear of immediate physical contact which would be painful, injurious, insulting, or offensive." *See* Iowa Code §708.1(2). In the alternative, the court found Heard "used his altered appearance as a non-verbal threat, creating circumstances which would put Aimee Hahn in fear of immediate serious injury." *See* Iowa Code §711.1(2). Heard argues on appeal there was insufficient evidence to

[2] Heard does not challenge the court's finding that he entered the store with the purpose of committing a theft. Thus, we do not address that finding and assume for purposes of this appeal that he did in fact enter the Coastal Mart with the intent to commit a theft of cash.

support a finding that he either committed an assault or made such a nonverbal threat. We address each of these alternative grounds separately.

A. Robbery Based on Commission of an Assault

Heard argues there was insufficient evidence for the trial court to find he committed "an assault upon another" because the "overt act," of placing the paper bag over his head and socks on his hands was performed outside the presence of the victim.

Our supreme court has previously concluded that assault requires some overt act supplementing any threat. *State v. Smith*, 309 N.W.2d 454, 457 (Iowa 1981). Thus, in order be guilty of robbery based on the assault alternative in Iowa Code section 711.1(1), a defendant must have performed an overt act.

The issue of what constitutes an overt act in the context of an assault appears to be one of first impression in Iowa. While we do not attempt to define the limits of what may constitute an overt act in the context of an assault in every case, we conclude the record here does not contain substantial evidence of such an overt act on the part of Heard.

As a preliminary matter, we note that we do not accept Heard's apparent assertion that the possible overt act here is limited to the physical act of placing the bag over his head and the socks on his hands, nor did the trial court limit itself to this specific act. The trial court found Heard's,

> *use of* a bag over his head and socks over his hands signaled his intention to commit some unauthorized act, placing the clerk in fear that she would be harmed, injured or offended in some fashion if she failed to comply with his instructions to give him the money.

(Emphasis added). We agree with the trial court that the requisite "overt act" is not limited to putting on the paper bag and socks, but instead may include wearing the bag and socks while committing the theft.

Black's Law Dictionary defines an overt act as,

> [A]n open, manifest act from which criminality may be implied. An outward act done in pursuance and manifestation of an intent or design. . . It must be something done that directly moves toward the crime, and brings the accused nearer to its commission than mere acts of preparation or of planning, and will apparently result, in the natural course of events, if not hindered by extraneous causes, in the commission of the crime itself.

Black's Law Dictionary 1104-05 (6th ed. 1991).

For several reasons we conclude that neither putting on the paper bag and socks outside the presence of Hahn nor wearing them during the theft can constitute the overt act required for an assault under section 708.1(2). First, if merely putting on and wearing items of disguise, clothing, glasses or similar articles could suffice as the requisite overt act, it would nevertheless be impossible to determine the point at which the amount and nature of such articles converts theft from the person of another under section 714.2(1) to robbery in the second degree.

Second, section 708.1(2) appears to contemplate physical action, bodily movement or activity, on the part of a defendant. It appears to contemplate an attempt at physical contact, or at a minimum a threatening gesture, under circumstances in which physical contact is possible. The mere status or passive condition of being clothed in or adorned with certain items would not appear to constitute such physical action or bodily movement or activity. Third, putting on and wearing items that constitute a disguise does not appear to meet the

definition of an overt act set forth above which requires in part that the act itself "will apparently result, in the natural course of events, . . . , in the commission of the crime itself."

We conclude that the record does not contain substantial evidence of an "overt act" by Heard that is necessary to constitute an assault.

B. Robbery Based on Threat of Immediate Serious Injury

Heard also argues that there was not sufficient evidence to support the trial court's finding that his altered appearance was a nonverbal threat of immediate serious injury to Hahn, and thus the court's alternative ground for finding him guilty of robbery in the second degree based on Iowa Code section 711.1(2) was erroneous. For the reasons that follow we agree.

Unlike robbery as defined under section 711.1(1), robbery as defined under section 711.1(2) does not encompass an assault as a necessary element and thus does not require an overt act. *State v. Wales*, 325 N.W.2d 87, 90 (Iowa 1982). However, under the first robbery alternative in section 711.1(2), a threat against another by the defendant is required. As stated above, the trial court found that Heard's altered appearance was a nonverbal threat of immediate serious injury to Hahn and thus found Heard guilty of robbery under the definition of robbery found in section 711.1(2), as well as under the assault alternative in section 711.1(1).

Whether a nonverbal or implied threat is sufficient to constitute a threat of immediate serious injury under Code section 711.1(2) also appears to be an issue of first impression in Iowa. However, other states with robbery statutes

containing some language and some elements similar to our section 711.1(2) have addressed the question.

In construing the phrase "uses or threatens the immediate use of physical force upon another" in its robbery statute, the Oregon Supreme Court in *State v. Hall*, 966 P.2d 208 (Or. 1998) looked to the dictionary definition of the terms "threaten" and "threat" and determined that the act of threatening another can be either explicit or implicit. *Hall*, 966 P.2d at 210. Having concluded the act of threatening can be either explicit or implicit, the court in *Hall* then had to determine if a person who demands the victim deliver property can implicitly threaten the immediate use of physical force. In so doing the court found that, "Whether a person implicitly threatens another in the course of an encounter depends on the reasonable inferences that the fact finder can draw from the encounter." *Id* at 211. It stated, "If the context in which the demands were made supports a reasonable inference that the person implicitly threatened the immediate use of physical force if the victim did not comply," a guilty verdict on the robbery charge was proper. *Id*.

In *Hall* the defendant came into the restaurant late at night while dressed in a manner that disguised his identity, stood across the counter from the cashier and told her to put the money in the bag, and after she complied told her to give him the money underneath the drawer. Based on these surrounding facts and circumstances the Oregon Supreme court found that a jury could reasonably infer that if the cashier did not comply with the defendant's demands to give him the money the defendant would use force on her to compel her to give him the

money or reach across the counter to take the money and use immediate physical force on her if she tried to stop him. *Id.*

In construing the phrase "threatens another with or intentionally puts him in fear of immediate bodily injury" in its robbery statute, the Wyoming Supreme Court in *Goodwine v. State*, 764 P.2d 680 (Wyo. 1998) stated that in Wyoming robbery was the combination of larceny and either the threat to the victim of immediate bodily injury or the intentional placing of the victim in fear of immediate bodily injury. *Goodwine*, 764 P.2d at 682. The court went on to state that the legislative intent of the robbery statute was "to reach all forms of express and implied threat immediately to inflict bodily injury." *Id.* It further stated that the language of the statute contemplated purposeful behavior and focused upon the accused's purposeful conduct in conveying, by express verbal threats, implicit nonverbal physical movement, or both, that harm would immediately result if the victim resisted the taking. *Id.* The court nevertheless reversed Goodwine's conviction for robbery, concluding that under the facts of the case there was insufficient evidence that Goodwine had threatened the victim with immediate bodily injury or intentionally put her in fear of immediate bodily injury. *Goodwine*, 764 P.2d at 683.

The result in *Hall* and the analysis in *Goodwine* would both suggest that, as argued by the State, the threat contemplated by Iowa Code section 711.1(2) can be an implied threat as well as an express threat. However, we believe that the court in *Goodwine* was correct in its indication that an implied threat of bodily injury requires "implicit nonverbal physical movement" conveying that harm will immediately result if the victim resists the taking. The record in this case does

not contain substantial evidence of the such purposeful implicit nonverbal physical movement. Further, beyond the statute's requirement of a threat of "physical force" in *Hall*, and the statute's requirement of a threat of "bodily injury" in *Goodwine*, the Iowa statute requires a threat of "immediate serious injury." Iowa Code § 711.1(2).

> *"Serious injury"* means disabling mental illness, or bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ, and includes but is not limited to skull fractures, rib fractures, and metaphyseal fractures of the long bones of children under the age of four years.

Iowa Code § 702.18. We conclude that even if the evidence were viewed as sufficient to support a finding that Heard's actions impliedly threatened the use of "physical force," or even "bodily injury," the evidence is insufficient to support a finding that he impliedly threatened "serious injury" as that term is defined by Iowa law.

We thus conclude that the record does not contain substantial evidence to support the trial court's alternative finding that Heard is guilty of robbery in the second degree as robbery is defined in section 711.1(2).

IV. CONCLUSION AND DISPOSITION

In conclusion, we hold that there was not substantial evidence of an "overt act" necessary to constitute an assault which is required for a conviction of robbery in the second degree as defined in section 711.1(1), and that there was not substantial evidence that the defendant impliedly threatened Heard with immediate serious injury, as necessary for a conviction of robbery in the second degree as defined in section 711.1(2). We conclude that the trial court's judgment must be reversed. We need not address the issue of whether or not a

trier of fact should be required to draw inferences in favor of innocence where the facts reasonably support alternative inferences.

REVERSED.

Sackett, C.J. concurs, Zimmer, J. dissents.

ZIMMER, J. (dissenting)

I respectfully dissent.

I would affirm the trial court's judgment and finding that Heard committed robbery in the second degree in violation of Iowa Code section 711.1(2), by purposely putting another in fear of immediate serious injury.

From the totality of the evidence, I believe Heard's actions, both verbal and nonverbal, created an implied threat of immediate serious injury. Heard entered the Coastal Mart at 4:20 a.m. where Hahn was working alone. He was dressed in a manner to disguise his identity. Heard approached within three and a half feet of Hahn and directed her to give him the money. After Hahn complied with the instruction, Heard demanded she give him the money underneath the cash drawer, as well as any other money in the store. Finally, he ordered the clerk to lay on the floor while he left with the money. Heard's words and acts clearly implied an intention to use force if his instructions were not followed.

From these facts, I believe that a rationale fact finder could infer the directions given to the clerk, based on the context in which they were made, were likely to create an immediate fear of serious injury or death. Given this record, I find the trial court did not err in finding Heard guilty of robbery in the second degree.