FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

368

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed August 26, 1987
vs.	)	
FRANCES JEAN SYKES,	)	7-222 86-1201
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Black Hawk County (D7X004740), Lawrence H. Fautsch and Robert E. Mahan, Associate Judges.

Defendant appeals from her conviction of theft in the third degree in violation of Iowa Code section 714.2(3). **AFFIRMED.**

Charles Harrington, Chief Appellate Defender; Dory A. Sutker and James F. Whalen, Assistant Appellate Defenders; for defendant-appellant.

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

Considered by Oxberger, C.J., and Snell and Hayden, JJ.

HAYDEN, J.

Defendant, Francis Jean Sykes, appeals from her conviction of theft in the third degree in violation of Iowa Code section 714.2(3). On March 27, 1986, defendant was found guilty by a jury of theft in the fifth degree. On June 16, 1986, defendant admitted to two convictions prior to the conviction of March 27 and thus pleaded guilty to theft in the third degree. On appeal, she challenges two instructions given the jury over her objection. She claims the flight instruction unduly emphasized evidence detrimental to her and the concealment instruction presented a mandatory presumption of intent and unduly emphasized evidence detrimental to her. We affirm.

I. **Flight Instruction.** The State requested a flight instruction. The court gave Iowa Uniform Jury Instruction No. 214 (criminal), which states:

> If you find the offense charged or included in the Information was committed, and that the defendant thereafter fled from the scene of the crime for the purpose of avoiding or retarding prosecution, then such flight is a circumstance you may consider in determining the guilt or innocence of the defendant.
>
> The credit and weight, if any, to be given such circumstance is for the jury to determine from a consideration of all the evidence in the case.

Although flight instructions are rarely advisable, the submission of a flight instruction does not necessarily constitute reversible error. State v. Marsh, 392 N.W.2d 132, 134 (Iowa 1986). An error in instructing the jury does not necessitate reversal unless it is prejudicial. State v. Gansz, 376 N.W.2d 887, 891 (Iowa 1985); State v. Seiler, 342 N.W.2d 274, 268 (Iowa 1983). Such error is presumed prejudicial, though, unless the contrary appears beyond a reasonable doubt from a review of the whole case. State v. Davis, 228 N.W.2d 67, 73 (Iowa 1975). But cf. State v. Marsh, 392 N.W.2d 132, 134 (Iowa 1986) ("defendant has failed to show he was prejudiced by the flight instruction"). The inquiry is whether the evidence was so dispositive of the issue that a reviewing court

can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the instruction. See Rose v. Clark, ___ U.S. ___, ___, 106 S. Ct. 3101, 3109, 92 L. Ed. 2d 460, 474 (1986) (discussing harmless error analysis in the context of Sandstrom error and citing Connecticut v. Johnson, 460 U.S. 73, 97 n.5 (1983) (Powell, J., dissenting)).

Defendant contends the flight instruction was erroneously given since it unduly emphasized her flight from the crime scene. She asserts this was prejudicial to her because it allegedly mislead the jury into thinking her guilt could be inferred from that flight, thereby obviating jury consideration of her defense of diminished capacity. She sought at trial to show she lacked specific intent due to kleptomania. We conclude submission of the flight instruction was not reversible error, assuming arguendo it was error, since it was not prejudicial to defendant.

The record reflects defendant admitted at trial the theft of the items from Gordy's Foods in Waterloo. She testified she took the items and put them in her purse. She admitted she did not plan to pay for them. The store manager testified he saw her putting items from her cart into her purse. When he approached her, she ran from the store. He confronted her in the store parking lot and she denied having anything in her purse. She then got in her car and drove off. Defendant's testimony corroborates this version of events. When she was stopped by the police a short time later, the items taken were recovered from her car.

The instruction stated defendant's flight was a circumstance the jury could consider in determining her guilt or innocence. We find the testimony of defendant, the store manager, and the arresting officers provides evidence sufficient for us to conclude the jury would have found it unnecessary to rely

on this circumstance to find defendant guilty. Defendant was not prejudiced by the flight instruction.

II. **Concealment Instruction.** The State also requested a concealment instruction. The instruction given stated:

> If the State has proved beyond a reasonable doubt that the defendant concealed unpurchased merchandise of Gordy's Foods, such conduct is material evidence that she concealed the merchandise with the intention to deprive the owner of the property. If you find such merchandise was found concealed upon defendant's person or among her belongings, such fact is material evidence of intent to deprive.

This instruction is based upon Iowa Code section 714.5.

Defendant contends this instruction presented a mandatory presumption of intent to the jury and unduly emphasized her concealment of the items taken. We address these contentions in the order presented.

It is settled law that application of a mandatory presumption in a criminal trial violates the due process clause because it undermines the responsibility of the factfinder to find the ultimate facts beyond a reasonable doubt. State v. Rinehart, 283 N.W.2d 319, 321 (Iowa 1979), cert. denied, 444 U.S. 1088 (1980). An instruction will be held unconstitutional if a reasonable juror could have interpreted it as constituting either a burden-shifting or conclusive presumption. Sandstrom v. Montana, 442 U.S. 510, 524 (1979). Defendant asserts the provision by the instruction of "material evidence of intent to deprive," without an explanation that this evidence was to be considered along with the other evidence presented, could have been interpreted by a reasonable juror as a conclusive presumption of intent. We disagree.

In State v. Estrella, 257 Iowa 464, 470, 133 N.W.2d 97, 101 (1965), the Iowa Supreme Court stated, in regard to an instruction based upon the statutory predecessor to Iowa Code section 714.5: "We find no presumption of a criminal intent in this instruction, but rather a clear statement that concealment must

be proven beyond a reasonable doubt before it could be considered as material evidence of intent to convert." Arguably, Estrella involved solely the divination of legislative intent and not a determination of the constitutionality of the statute. Nonetheless, we find the conclusion drawn in Estrella and set forth above to be persuasive. In essence, defendant would have us hold an instruction providing for "material evidence" creates a mandatory presumption unless the jury is also specifically instructed to only consider this "material evidence" in conjunction with the other evidence presented. We decline to do so. A reasonable juror would not determine he must find intent merely because an instruction provides him with a piece of material evidence supporting such a finding.

Defendant's second contention is the instruction unduly emphasized her concealment of the items taken. Estrella is again instructive:

> The rule (against undue import or reference to evidentiary facts in instructions) is not violated by the mere fact that the court, in instructing the jury, charges on a particular issue, theory, or defense, or alludes to particular testimony or parts of the evidence, where the instruction is given in such form and manner that, particularly when viewed with other instructions, it cannot reasonably be understood by the jury as an intimation that the court attaches any undue importance to the issue, contention, or defense charged on, or to particular facts or circumstances, or particular parts of the evidence alluded to. (Citations.)

Id. (quoting State v. Critelli, 237 Iowa 1271, 1283, 24 N.W.2d 113, 120 (1946)).

In this case the jury was instructed it was the sole judge of the weight of the evidence, the credibility of the witnesses and the conclusions to be drawn from the facts and circumstances proved. It was given a diminished responsibility instruction, pursuant to defendant's defense. When viewed with these instructions and others, we find the jury could not have concluded the trial court attached any undue significance to the evidence of concealment in the case.

Based on the foregoing, we conclude the submission of the concealment instruction was not error.

AFFIRMED.