IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

IN THE INTEREST OF M.B., A Child,) **Filed October 29, 1985**

Appellant) 5-439
85-256

Appeal from the Iowa District Court for Black Hawk Juvenile Court, Robert E Mahan, Judge

The juvenile appeals from an adjudication of delinquency and subsequent dispositional order **REVERSED.**

Brett J Long of Gottschalk, Shinkle & Long, Cedar Falls, for the appellant juvenile

Thomas J Miller, Attorney General, Charles K. Phillips, Assistant Attorney General, and John Henson, Assistant Black Hawk County Attorney, for appellee State

Heard by Oxberger, C J , Snell, and Sackett, JJ.

OXBERGER, C.J.

The juvenile, M.B., has appealed from the trial court adjudication of delinquency and subsequent dispositional order. The court found the juvenile had committed the offense of theft. We find the evidence insufficient to support the determination and reverse the trial court.

On November 1984 six juveniles left a county Youth Shelter. M.B. was one of the juveniles. She and three of the juveniles remained together at a street corner while two of the juveniles left. The two youths who left did not tell M.B. or the other juveniles where they were going or what they were going to do. They returned with a brown Cadillac they had taken. They all got into the car and began driving without any set destination in mind. One of the juveniles, D.F., said while driving to Cedar Rapids they became aware of the fact the car was taken without permission. The youths were given the opportunity to get out of the car at that point. The license plate numbers were changed and hubcaps removed from the car in an effort to avoid detection. M.B. did not drive the car or participate in removing the license plates or hubcaps. The group finally ended up in Omaha, Nebraska. M.B. and D.F. bought bus tickets to return to Waterloo and were discovered by a detective at the bus depot. The record shows the juveniles drove around in the car until they were caught.

M.B. has appealed from the court's adjudication that she is a delinquent, contending there was insufficient corroboration of D.F.'s testimony. She also says there is insufficient evidence that she exercised control over the car or intended to deprive the owner permanently of his property.

The State claims the evidence is sufficient to show M.B. violated two sections of the Code proscribing theft. Pursuant to section 714.1(1) a theft is committed when a person takes possession or control of another's property with

the intent to deprive the rightful owner of the property. The other pertinent provision is found at section 714.1(4) indicating a theft occurs when a person exercises control over property they know or have reason to know is stolen. The State says the evidence supports conviction of violation of either section of the Code, and further that M.B. is guilty either as an accomplice of the other youths or through her own separate actions.

An aider or abettor is liable for the actions of the principle. Iowa Code § 703.1 (1985). To prove that a person is an aider or abettor it must be shown the person assented to or lent countenance and approval to the act either by active participation or in some manner encouraging it "prior to or at the time of its commission." State v. Doss, 355 N.W.2d 874, 878 (Iowa 1984)(emphasis original).

The evidence is uncontroverted that at the time the two juveniles took possession and control of the car, M.B. was not present, nor had she given her assent to the action in any manner. Further, the evidence shows only an intent not to return the car. The court has indicated an intent not to return property is not the same as the intent to permanently deprive another of their property. State v. Auerbach, 283 N.W.2d 278, 280 (Iowa 1979). The evidence cannot support a conviction pursuant to section 714.1(1) of the Code.

If it can be shown that M.B. aided and abetted the principles, her conviction will be upheld upon sufficient proof the principle exercised control over property known to be stolen. Iowa Code §§ 703.1, 714.1 (4). The presence of a person at the scene of a criminal act is insufficient to prove they aided and abetted, but participation can be inferred from circumstantial evidence "including presence, companionship and conduct before and after the offense is committed." Fryer v. State, 325 N.W.2d 400, 406 (Iowa 1982).

It has been stated, "The underlying precept of aiding and abetting is a requirement that the accessory in some way 'associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed.' ". State v. Lott, 255 N.W.2d 105, 108 (Iowa 1977) (citing with approval United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938). In another instance the federal court has found the evidence insufficient to support a finding that the defendant aided in sale of drugs when she introduced two undercover agents to a supplier and was present during part of the transaction, but did not participate. United States v. Moses, 220 F.2d 166, 168 (3d Cir. 1955).

The Iowa court has found something more than presence must occur to show an aim in assisting in the goal of the crime. State v. Lott, at 108. In Lott it was sufficient that the defendant arranged for a meeting to buy drugs at an apartment, expressed willingness to arrange future sales, and made sure the transaction was completed. Id. In another case, a woman who was shoplifting engaged in a struggle for her purse containing the stolen goods with a clerk, left the building, and then the defendant took up the struggle for the purse. State v. Miles, 356 N.W.2d 517, 520 (Iowa 1984). This was sufficient evidence to find the defendant aided the shoplifter, along with the fact the principle took the defendant's child with her when she fled, and the defendant made several false statements in an attempt to conceal the theft. Id. Evidence was adequate to show an intent to aid and abet where the defendant during a robbery and murder called himself the boss, shot at two of the victims, and aided in placing another victim in a truck. Fryer v. State, at 406. More than presence at the scene was also found in a case where the driver of a car was seen near the scene of the robbery, driving at night with the car lights off, and a person fitting

the description of the robber was seen as a passenger in the car. State v. Myers, 158 N.W.2d 717, 721 (Iowa 1968). The fruits and instrumentalities of the robbery were also found secreted in the car. Id.

The evidence in this case is lacking in all the essentials other than the presence of the juvenile M.B. in the car. There is nothing to show that she aided in the goal of the other youths. She did not drive the car, did not assist in changing the license plates or removing the hubcaps, nor gave any advice or counsel. We find the evidence falls well short of that necessary to show M.B. aided and abetted in the crime.

We also find the evidence insufficient to establish her guilt without looking to the actions and intent of the other juveniles. To exercise control over property indicates the ability to direct influence over it in some manner. See State v Horrell, 260 Iowa 945, 955-56, 151 N.W.2d 526, 533 (1967)(there must be some express or implied assertion of ownership); 52 A. C.J.S. Larceny § 107 (1968)(there must be dominion, control and authority over the property); Black's Law Dictionary 399 (rev. 4th ed. 1968). The record in this matter is devoid of any evidence showing the ability of M.B. to exercise any type of influence or control over the stolen property. Mere association with stolen property is not enough to support a theft charge. 52A C.J.S. Larceny at § 107. In another jurisdiction the court found that riding in the back seat of a stolen automobile is in itself insufficient to support a conviction of theft or larceny. People v. Abrams, 360 Ill. 594, 196 N.E. 801(1935). We agree with the appellant that the evidence is insufficient to support the charge and reverse the trial court. As a result of our disposition we do not address the other issues presented by appellant.

REVERSED.