



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed November 19, 1979
vs.	)	
FRANK W. HALL,	)	228
Defendant-Appellant.	)	62744

Appeal from Benton District Court - August F. Honsell, Judge.

Defendant appeals second degree theft conviction, alleging denial of due process, erroneous admission of evidence, improper jury instructions and improper sentencing. Affirmed.

Don Boddicker, Vinton, for defendant-appellant.

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

Heard by Oxberger, C. J., Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Defendant, Frank W. Hall, appeals from a jury conviction of second degree theft, a violation of sections 714.1, 714.2, and 714.3, Code Supp. 1977. On appeal, defendant asserts he was denied his constitutional right to a fair trial with due process of law when several bad checks were aggregated to support a second degree theft classification, and the information filed against him failed to allege a "single scheme, plan or conspiracy" and did not mention section 714.3, Code Supp. 1977. In addition, defendant claims the trial court erred in allowing testimony about certain bad checks that were never admitted into evidence, thus permitting inadmissible evidence to be used to prove criminal disposition. Defendant further claims the trial court erred in instructing the jury on a "single scheme, plan or conspiracy" when that was not charged in the information. Finally, defendant contends that since the information only properly charged him with a misdemeanor for any one of the bad checks, he should have been sentenced as a misdemeanant and, as such, was not required to be present at sentencing. We affirm.

In reviewing the defendant's appeal from a criminal conviction, we view evidence in the light most favorable to the State, without consideration of contradictions or inconsistencies; the benefit of all reasonable inferences is given to the State. It is the role of the fact-finder to resolve questions of fact and determine the credibility of witnesses. A finding of guilt by the trier of fact is binding on the appellate court unless it is found to be without substantial support in the record or is clearly against the weight thereof. State v. Jones, 271 N.W.2d 761, 763 (Iowa 1978); State v. Herndon, 257 N.W.2d 19, 22 (Iowa 1977); State v. Overstreet, 243 N.W.2d 880, 884 (Iowa 1976).

I.

The county attorney's information charged the defendant with theft in the second degree, a class "D" felony, in violation of section 714.1. Specifically, defendant was charged with making, uttering, drawing, and delivering checks totalling in excess of \$1600 and receiving property in exchange for them, knowing that the checks would not be paid when presented. At trial, the State offered testimony, over defendant's objection, from ten Benton County merchants who each received from the defendant at least one bad check written on April 15, 1978. Over defendant's objection, seven of

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these bad checks were offered into evidence by the State. None of the checks exceeded \$500 in value; however, the total value of the seven checks offered into evidence exceeded \$1037.

The court denied defendant's motion for acquittal at the close of the prosecution's case. Defendant rested without offer of evidence. During closing arguments, the prosecution informed the jury for the first time that thefts attributable to a "single scheme, plan or conspiracy" may be considered a single theft and the value may be the total value of all the properties stolen. The court gave a similar instruction to the jury over the defendant's objection that the instruction added a new theory to the case. The jury found defendant guilty of second degree theft. Defendant requested he not be required to be present for sentencing on the theory that he was only charged with a misdemeanor and thus his presence was not required. The court denied defendant's request and required defendant to be present for sentencing. Defendant brings this appeal from that judgment and sentencing.

II.

The information filed by the Benton County Attorney provided:

[T]he State of Iowa, accuses Frank W. Hall of the crime of theft in the second degree in violation of Iowa Code Section 714.1, and charges that said Frank W. Hall, did on or about the 15th day of April, A.D., 1978, in the County of Benton, State of Iowa:

make, utter, draw and deliver checks totaling in excess of \$1600.00 and received property in exchange therefor, knowing that said checks would not be paid when presented, all in violation of Iowa Code Section 714.1(6), the 1977 Code of Iowa, as amended.

The defendant contends the State's failure to allege in the information that the value of the checks were being aggregated pursuant to section 714.3 violated his sixth amendment right to be informed fully as to the charges against him. An indictment is sufficient if it contains the elements of the offense charged and fairly informs the defendant of the charges, and enables the defendant to plead an acquittal or conviction as a bar to future prosecutions for the same offense. Hamling v. United States, 413 U.S. 87, 117, 94 S. Ct. 2887, 2907, 41 L. Ed. 2d 590, 620 (1974); Hagner v. United States, 285 U.S. 427, 431, 52 S. Ct. 417, 419, 76 L. Ed. 861, 865 (1931). This rule likewise applies to informations since informations are to be considered and construed in the same manner

as an indictment. See Lamb v. Davis, 244 Iowa 231, 235, 56 N.W.2d 481, 483 (1953), \$ 769.13.

The elements of the offense of theft by false drawing or uttering of checks are: Intent to defraud; securing money, credit or other thing of value by means of check, draft or written order; and knowingly not having any arrangement, understanding or funds with the bank, person or corporation on which the check or other instrument is drawn sufficient to meet or pay the same. State v. Mullin, 225 N.W.2d 305, 307 (Iowa 1975); State v. Mason, 203 N.W.2d 292, 295 (Iowa 1973). The information also indicated the degree of theft the defendant was charged with. By charging the defendant with second degree theft, the information gave Hall notice the State intended to prove the theft of property in excess of \$500 in value. Since the charges in the information followed substantially the wording of the statute, which embodies all of the elements of the crime, and such charges clearly informed the defendant of the crime with which he was accused, it is inconceivable to us how the defendant could have been misled as to the offense with which he stood charged. See State v. Davison, 245 N.W.2d 321, 324 (Iowa), cert. denied, 430 U.S. 955, 97 S. Ct. 1600, 51 L. Ed. 2d 805 (1976); State v. McConnell, 178 N.W.2d 386, 388 (Iowa 1970). Furthermore, we find the information was sufficient to enable Hall to plead an acquittal or conviction, as a bar to future prosecutions for the same offense.

If Hall did not believe this information was sufficient, he had a right to make a motion for a bill of particulars pursuant to rule 10(5), Iowa R. Crim. P., to clarify the charges. The defendant, however, did not make any motions or objections challenging the sufficiency of the information prior to his trial. Rule 10, Iowa R. Crim. P., requires defenses and objections based on defects in the indictment or information to be raised prior to trial. Failure to do so is deemed to be a waiver of the objection. State v. Thomas, 262 N.W.2d 607, 609 (Iowa 1978); see State v. Glenn, 234 N.W.2d 396, 399 (Iowa 1975); State v. Grandy, 231 N.W.2d 869, 874 (Iowa 1975). Thus, defendant failed to preserve the alleged error for review. We, therefore, hold the information did not violate defendant's sixth amendment right to be fully informed as to the charges against him. We further find that defendant's failure to make a timely objection to the information constituted a waiver of any defects the information may have had.

III.

Defendant's next contention is that the trial court allowed inadmissible evidence to be used to prove criminal disposition. The basic premise of defendant's argument is that the trial court erred in allowing testimony about certain bad checks that were never offered as evidence to be admitted into the record. At trial, the only objection offered by the defendant to this testimony was that it was "[i]ncompetent, irrelevant and immaterial to substantiate the State's charges."

A witness is competent so long as he has sufficient capacity to understand the obligation of an oath, except as otherwise declared by statute. § 622.1, The Code 1979. From the testimony offered by each witness, we find they each had the capacity to understand the obligation of an oath. The defendant did not contend, nor does this court find, any statute that would make any of these witnesses legally incompetent to testify in this case. Therefore, we find the witnesses were competent to testify against the defendant.

Additionally, there is no merit to defendant's objection that the evidence was irrelevant. The basic test of relevancy is whether the challenged evidence makes the desired inference more or less probable than it would be without the evidence. Carson v. Mulnix, 263 N.W.2d 701, 706 (Iowa 1978); Kalianov v. Darland, 252 N.W.2d 732, 735 (Iowa 1977). The testimony of each of the witnesses was relevant to proving that the bad checks written by the defendant on April 15, 1978, were all part of a single scheme, plan, or conspiracy since their testimony made it more probable that defendant wrote the checks in question. It was within the trial court's discretion to determine that the evidence's probative value outweighed its prejudicial effect. State v. Nowlin, 244 N.W.2d 596, 600 (Iowa 1976).

Nor is there any merit to defendant's objection that the evidence was immaterial. Materiality of evidence refers to the pertinency of the offered evidence to the issue in dispute. Vine Street Corp. v. City of Council Bluffs, 220 N.W.2d 860, 862 (Iowa 1974). Whether the bad checks written by Hall were all part of a single scheme, plan, or conspiracy was an issue in dispute. Hence, any testimony offered to establish such a scheme, plan or conspiracy was material. We hold, therefore, the trial court properly overruled defendant's objection that the evidence was incompetent, irrelevant and immaterial.

The objections to the testimony that the defendant is now making on appeal--witnesses' testimony was improperly admitted because the trial information was defective and some testimony was related to checks not received into evidence--are based on different grounds than those that he raised at trial. It is well settled that an argument not raised at trial cannot be raised for the first time on appeal. State v. Jump, 269 N.W.2d 417, 430 (Iowa 1978); State v. Holbrook, 261 N.W.2d 480, 482 (Iowa 1978); State v. Lemburg, 257 N.W.2d 39, 46 (Iowa 1977). We need not consider whether there is any merit to defendant's objection now raised for the first time on appeal.

IV.

At the close of the prosecution's case, the defendant rested without any offer of evidence. The trial court then provided counsel for the parties with copies of proposed jury instructions. Defendant objected to instructions numbers 5, 9, 10, and 12. The trial court overruled these objections. Instruction 12 provided:

The "value of property," as used in these instructions, means its normal market or exchange value within the community at the time of the theft. If money or property is stolen by a series of acts from the same persons by a series of acts which occur in approximately the same location or time period so that the thefts are attributable to a single scheme, plan or conspiracy, such acts may be considered a single theft and the value may be the total value of all the property stolen.

Defendant contends the court should have eliminated the question of the existence of a plan, scheme, or conspiracy as an issue in the case, and thus not have instructed the jury as to value where a plan, scheme or conspiracy is found to exist. As we have already stated, the information was sufficient to give defendant notice that the value of the checks were going to be aggregated pursuant to section 714.3. In a prosecution for theft, the value of the property stolen is an essential element in determining the punishment to be inflicted on the accused. Since it is the duty of the trial court to fully instruct the jury on the law applicable to the issues, it is proper for the court to instruct the jury on possible methods of determining the value of the property taken. See State v. Jacoby, 260 N.W.2d 828, 836 (Iowa 1977); State v. Ritchison, 223 N.W.2d 207, 211 (Iowa 1974). We have held the information sufficient to give the defendant notice that the value of the checks written on April 15, 1978, were being aggregated pursuant to section 714.3 as part of a "single scheme, plan or conspiracy"; we, therefore, find instruction 12, which merely restated section 714.3, was proper since it explained to the jury the law on

how to value the property stolen if a "single scheme, plan or conspiracy" was found to have existed.

V.

Defendant's final argument is that the trial court erred in not sentencing defendant as a misdemeanor and requiring defendant to be present at sentencing. Since we hold the information sufficient to charge defendant with a class "D" felony, and the jury found defendant guilty of that charge, we find no merit in defendant's argument that he should have been sentenced as a misdemeanor. Iowa R. Crim. P. 25.

AFFIRMED.