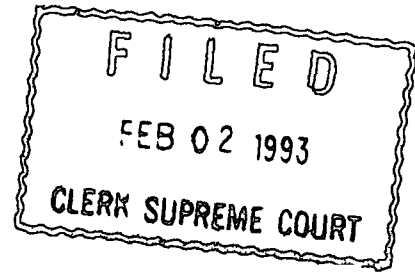


IN THE COURT OF APPEALS OF IOWA

No. 2-288 / 91-1131



STATE OF IOWA,

Appellee,

vs.

JAMES CARL KAUFFMAN,

Appellant.

Appeal from the Iowa District Court for Scott County,
James E. Kelley, Judge.

James Kauffman appeals his first-degree theft
conviction. **AFFIRMED.**

Kent A. Simmons, Davenport, for appellant.

Bonnie J. Campbell, Attorney General; Martha E. Boesen,
Assistant Attorney General; William E. Davis, County
Attorney; and Theodore Priester, Assistant County Attorney,
for appellee.

Heard by Oxbarger, C.J., and Schlegel and Habhab, JJ.

HABHAB, J.

FACTS

On October 8, 1990, the State charged the defendant, James Kauffman, and his wife, Charlotte, with first-degree theft. The Kauffmans were charged with alternative theories of theft, theft by taking or theft by misappropriation. The State alleged that Vivian Murray transferred over \$50,000 to the Kauffmans during the period from November 1, 1987 through October 31, 1989. Murray wrote a total of twenty-eight checks: sixteen checks were written to and endorsed by James; one check was written to and endorsed by Charlotte; and the remaining eleven checks were written to the Davenport A.A.U., an organization formed by the defendant, and endorsed by the defendant. The State alleged the money was deposited into Charlotte's account for the Kauffmans' personal use.

Vivian Murray is an eighty-year-old diabetic who suffers from Parkinson's disease. Parkinson's sufferers become confused, their vision and hearing are diminished, and their perception is troublesome. Murray was unable to testify at the hearing because of her physical condition.

In June 1991, the Kauffmans were tried jointly by a jury. The jury acquitted Charlotte, but found the defendant guilty of first-degree theft. The trial judge sentenced the defendant to prison for up to ten years.

James appeals. We affirm.

SCOPE OF REVIEW

Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

ANALYSIS

I. First-Degree Theft or Theft by Misappropriation.

The defendant contends the State failed to prove the money transfers were not by consent and, therefore, the State failed to prove he committed theft by taking or misappropriating. We disagree.

The defendant was charged with committing theft either by taking in violation of Iowa Code section 714.1(1) or by misappropriation in violation of Iowa Code section 714.1(2) (1989). The jury returned a general verdict of guilt against the defendant.

As it relates to the crime of theft by taking, the jury was instructed that the elements of theft by taking are:

1. Between November 1, 1987 and October 31, 1989, [d]efendant James C. Kauffman took possession or control of money.
2. The [d]efendant James C. Kauffman did so with the intent to deprive Vivian Murray of the money.
3. The money, at the time of the taking, belonged to Vivian Murray.

See Iowa Code 714.1(1) (1989); see also Jury Instruction 10.

As it relates to the crime of theft by misappropriation, the jury was instructed as to the elements of this offense as follows:

1. Defendant James C. Kauffman had possession or control of money which was owned by Vivian Murray.
2. Between November 1, 1987 and October 31, 1989, [d]efendant James C. Kauffman intentionally misappropriated the money by using it or disposing of it in a manner which was inconsistent with Vivian Murray's rights.

See Iowa Code § 714.1(2) (1989); see also Jury Instruction 10.

A jury verdict is binding upon us unless there is an absence of substantial evidence in the record to sustain it. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). When reviewing the record, we may make any legitimate inferences and presumptions which may fairly and accurately be deduced from the evidence in the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984).

We find substantial evidence to support a jury finding of guilt under both theories as charged by the State. We affirm as to this issue.

II. Jury Instructions.

The defendant contends the trial court erred by refusing to include a nonconsent provision in jury instructions 10 and 12. At trial, the defendant objected to these instructions and asked the court to include a provision stating that taking was without consent of the owner. The trial judge refused the defendant's request and stated the nonconsent element was implicit in the marshaling instruction on taking because it required a finding of intent to deprive. We agree with the trial court.

Our scope of review on this issue is for errors of law. Iowa R. App. P. 4. We find the trial court did not err in refusing to include a nonconsent provision in the jury instructions. We note jury instructions 10 and 12 mirror the Uniform Jury Instructions. See 2 Iowa Uniform Criminal Jury Instructions 1400.1, 1400.2, 1400.4 (1991). Although these instructions do not contain the words "without consent," they do contain the words "intent to deprive." Implicit in the words "intent to deprive" is that the taking must be done without consent.

The elements of theft by taking are (1) taking possession or control of money; (2) with the intent to

deprive another; and (3) at the time of taking, the money did not belong to them. See Jury Instruction 10.

Instruction 12 provides a definition of intent to deprive. It states:

As used in these instructions, theft means taking possession of property belonging to another person, with the intent to deprive that person of that property.

The intent to "deprive" that person of the property means:

(a) to permanently withhold, or withhold for so long or under such circumstances, that the benefit or value of the property is lost; or

(b) the property is disposed of so that it is unlikely the owner will recover it.

Jury Instruction 12 (emphasis added).

The trial court articulated the plain meaning of "intent to deprive" when it denied defendant's request that the instruction contain the words "without consent." The court stated:

Depriving is a verb form, to deprive, to take away from or to remove from the use or control of another. The implication is it's without the consent of the other. That's where -- that's where your objection lies, and I'm saying it's not there because the word "deprived" means to take away from.

We affirm the trial court on this issue.

CONCLUSION

After considering all issues presented, we affirm the trial court. We affirm the defendant's convictions and sentences.

Costs of this appeal are taxed to the appellant.

AFFIRMED.