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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

558

STATE OF IOWA,

Plaintiff-Appellee,

vs.

LYNETTE ROGAN,

Defendant-Appellant.

Filed June 26, 1984

4-132
83-370

Appeal from the Iowa District Court for Polk County - M. J. V. Hayden, Judge.

Defendant appeals from her conviction for theft in the first degree in violation of Iowa Code sections 714.1(1) and 714.2(1) (1981). AFFIRMED.

Charles Harrington, Chief Appellate Defender, and LuAnn White, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and John P. Messina, Assistant Attorney General, for plaintiff-appellee.

Heard by Snell, P.J., and Schlegel and Sackett, JJ.

SCHLEGEL, J.

Defendant, Lynette Rogan, appeals from her conviction for theft in the first degree in violation of Iowa Code sections 714.1(1) and 714.2(1) (1981). Rogan was charged with taking possession or control of two fur coats valued in excess of five thousand dollars from a store in Valley West Mall in West Des Moines, Iowa, with the intent to deprive the owner thereof. Rogan asserts on appeal that there was insufficient evidence to prove the "possession or control" or "intent to deprive" elements of theft. We affirm.

I. Rogan moved for a judgment of acquittal, Iowa Rule of Criminal Procedure 18(8), on the theft charge at the end of the State's case and again at the close of all the evidence on the ground that the State had presented insufficient evidence to sustain a conviction. In both instances, the motions were overruled.

The principles of law for reviewing a motion for judgment of acquittal based on sufficiency of the evidence are well established:

> When reviewing the sufficiency of evidence, we view the evidence in the light most favorable to the State, including all legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. It is necessary to consider all of the evidence and not just the evidence supporting the verdict. A jury verdict is binding upon this court and will be upheld unless the record lacks substantial evidence to support the charge. Substantial evidence means evidence which would convince a rational trier of fact that the [defendant is] guilty of the crime charged beyond a reasonable doubt.

State v. Blair, ___ N.W.2d ___, ___ (Iowa 1984).

From the evidence presented at trial, the jury could have found the following facts.

A women's ready-to-wear store, The Avenue, opened in the mall on September 9, 1982. The store sold moderately priced to expensive dresses as well as some expensive women's fur jackets. Rogan was at the opening on Thursday night and was assisted for approximately ten minutes by Jane Williams, a clerk, in trying on some dresses. She returned to the store the next night and again spoke

briefly with Williams. Rogan was accompanied by a lady on the first night, but there was no evidence presented to show whether she was accompanied by anyone on the second night. Rogan returned again on September 11, 1982, a Saturday night, accompanied by a black man.

The store manager, Dorothy Boehn, observed a black man looking through the clothing in the back of the store on Saturday night. While she was offering the man assistance, Rogan, a large black woman, came out of a dressing room ordinarily used for trying on furs and handed Boehn two dresses that did not fit. Rogan was wearing a black sweat shirt or sweater, an orange-red full skirt, and sandals. Boehn noticed a large bulge sticking out behind Rogan's skirt. Boehn then asked another employee to call security and went to the front of the store to roll down an electronic gate in an attempt to keep the man and woman from leaving. Boehn did not have the keys to the gate, so she and another employee guarded the front of the store. Boehn lost sight of Rogan and the black man when she went to the front of the store.

A customer, Michelle Maher, was in another dressing room in the rear area of the store trying on a dress at this time. While she was dressing someone kicked two fur coats underneath the partition into her dressing room stall. The partition was approximately eighteen inches off the floor and Maher was able to see that the person who kicked the coats under the partition was black and wore sandals. Maher believed, at the time of the incident, that the leg was that of a female rather than a male. The coats, one a white fox fur valued at $4,500 and the other a dyed muskrat fur valued at $2,700, were wadded up and one sleeve on one of the coats was turned inside out. This enabled the coat to be packed in a smaller area. The labels on the coats were rumpled and two hangers, both normally used on fur coats, were eventually found behind the mirror in the dressing room Rogan had originally came out of.

Boehn next saw the black man and Rogan walking out of the fur department towards the front of the store. She approached them and stated that she had reason to believe Rogan had merchandise with her and that the two were not to leave the store. The man darted out of the store. At that time Boehn noticed that the bulge under Rogan's skirt was gone but that there were white fur hairs on Rogan's black sweatshirt. Rogan denied taking any merchandise and said that she had been wearing a rabbit fur earlier that day. A search after security arrived revealed that Rogan had no merchandise in her possession at that time.

Boehn did not see the fur jackets removed from the rack and she did not see Rogan remove the jackets from her skirt. Neither Boehn nor anyone else, with the exception of Maher's glimpse of a leg, saw who put the fur jackets in the dressing room being used by Maher. However, with the exception of Maher, Rogan and the black man were the only two customers in that area of the store.

Rogan testified that she had gone shopping at The Avenue with John and Judy Sharp who are both black. She said that she had sat next to Judy Sharp, who was wearing a rabbit fur jacket, on the way to the mall. She further testified that she had been browsing in the store looking at dresses, but that at no time did she have possession or control of any fur coats at The Avenue. She also testified that she had not previously been to The Avenue.

II. The parties dispute on appeal whether or not Michelle Maher's testimony that the leg of the person who kicked the fur coats under the dressing room partition belonged to a black female wearing sandals, was excluded by a ruling made by the trial court. The court ruled that part of Maher's testimony was inadmissible because it was outside the minutes of testimony submitted by the State.

It is clear that Maher testified on direct examination without objection that ". . . the person was black and I know they had on sandals." The defendant, in response to a subsequent question by the State asking for a description of the leg

and foot, objected that the testimony was outside the scope of the minutes of testimony. During an offer of proof it was made clear to the trial court that the objection was only to the witness's identification of the leg as belonging to a male or female rather than race. The trial court sustained the objection on that basis and sustained a motion to strike the testimony from the record. However, the defendant subsequently questioned Maher on cross-examination as to her impression that the leg belonged to a female rather than a male. The State also questioned Maher on that subject on redirect without objection by defendant. The defendant, although she had a favorable ruling by the court, thereby waived any objections to the testimony. State v. Schmidt, 312 N.W.2d 517, 518 (Iowa 1981). That evidence, therefore, is part of the record.

III. There was substantial circumstantial evidence showing that Rogan had possession of the coats valued in excess of five thousand dollars with an intent to deprive the owners thereof. The State's evidence would permit a reasonable juror to conclude that Rogan was in The Avenue on September 11; that she concealed fur coats under her skirt with the intent to deprive the owner of the property; that when the store manager requested that another employee call security Rogan removed the coats; that Rogan kicked the coats in their crumpled state into Maher's dressing room; that Rogan and her accomplice attempted to leave the store but were detained by the manager; and that the fur coats were valued in excess of five thousand dollars.

It is true that there was no direct evidence Rogan had possession or control of the coats. However, the fur hairs on her sweatshirt or sweater, the bulge in her skirt, and the kicking of the coats under the dressing room partition by a black person wearing sandals permitted the jury to reasonably conclude that Rogan had the coats concealed in her skirt. Circumstantial evidence and direct evidence are equally probative. Iowa R. App. P. 14(f).

Finally, the fact that a person has a concealed unpurchased property of a store, either on the premises or outside the premises, is material evidence of intent to deprive the owner of the property. Iowa Code § 714.5 (1981). This fact, in addition to the other circumstances in this case, constitutes substantial evidence that Rogan intended to "deprive" the store of possession of the coats as that term is contemplated in Iowa Code section 714.1(1) (1981).

Accordingly, we conclude there was substantial evidence in the record to support the court's submission of the charge of first-degree theft to the jury. We hold the trial court did not err in overruling defendant's motions for a judgment of acquittal.

AFFIRMED.