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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Appellee,

v.

DEREK EUGENE DOOLIN,

Appellant.

Filed June 30, 1978

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Appeal from Linn District Court - Harold G. Swailes, Judge.

Defendant appeals his conviction for false pretenses, a violation of § 713.1, The Code, asserting the evidence was not sufficient to establish the elements of the offense charged. Reversed.

Gary L. Robinson, Cedar Rapids, for appellant.

Richard C. Turner, Attorney General, Thomas A. Evans, Jr., Assistant Attorney General, and Eugene J. Kopecky, Linn County Attorney, for appellee.

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

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ALLBEE, C.J.

Defendant, Derek Eugene Doolin, attacks his conviction for false pretenses, a violation of § 713.1, The Code. We need consider only one issue raised by defendant. He contends that the victim, Sears, Roebuck & Co., did not rely upon his false representation in parting with the money paid to defendant. Because we find ourselves in agreement with this contention, we reverse.

On July 1, 1977, Patricia Mussig discovered that certain childrens' clothing which she had purchased at Sears had been removed from her parked car. The clothing was still in the paper sack from Sears; that sack also contained the sales receipt for the clothing and several other items. She immediately telephoned Sears and spoke to Marilyn Stauffer, an employee in the Sears childrens department, notifying Sears of the theft. Stauffer made a list of the stolen items, and informed her immediate supervisor, John Dyer, of the theft.

Shortly thereafter defendant appeared at the childrens department, produced four items on the list of stolen goods and a receipt, and requested a refund. Stauffer consulted Dyer, in accordance with the usual refund practice. Dyer approved the refund and then consulted with his superior, Robert Horner. The three Sears employees testified that the company policy, while exceptions were possible, was to make a refund at any time that an individual could present a receipt for the goods to be returned. All three were aware of the likelihood that they were receiving stolen goods. Indeed, Patricia Mussig was called shortly thereafter, and informed that the goods stolen from her had been returned. When she came for them, she identified them as those articles; Sears then resold them to her.

The elements of false pretenses were set out in State v. Warren, 212 N.W.2d 509, 513 (Iowa 1973). The dispute here is on the fifth element: reliance by the victim upon the false representations in parting with money or other property. The question is whether the victim was actually deceived, not that a reasonable person would or would not have been. State v. Fooks, 65 Iowa 196, 198, 21 N.W. 561 (1884). The false pretenses need only have acted so that the victim would not have given value without their influence. Id.; see also State v. Mullin, 225 N.W.2d 305, 307-09 (Iowa 1975) (dealing with need for reliance under § 713.3, The Code).

Our standard of review of trial court's refusal to grant a directed verdict is set out in State v. Overstreet, 243 N.W.2d 880, 883-84 (Iowa 1976). Examining the record in light of this standard, there is no evidence to support an inference that Sears, through its employees, relied upon defendant's fraudulent representation. Instead, the only inference which the evidence permits is that the refund was given solely on the basis of a company policy requiring that such a refund be given to anyone who presents a receipt. See Beaty v. State, 48 Ala. App. 699, 267 So.2d 490 (1972); cf. People v. Lorenzo, 64 Cal. App. 3d 43, 135 Cal. Rptr. 337 (1976).

We do not give any consideration to the possibility that defendant may be guilty of any other crimes arising out of this or closely related transactions.

Upon remand, the county attorney's information shall be dismissed.

REVERSED.

SNELL and OXBERGER, JJ., concur; DONIELSON and CARTER, JJ., dissent.

CARTER, J. (dissenting)

I dissent. The majority, citing State v. Fooks, 65 Iowa 196, 198, 21 N.W. 561 (1884), state that in determining the matter of reliance of the victim, in a prosecution for the crime of false pretenses, "the false pretenses need only have acted so that the victim would not have given value without their influence." In applying this rule to the present case, I submit that the jury, viewing the evidence most favorably toward the State, could have found defendant's conduct induced Sears to part with the money, which it would not have done but for such conduct.

Where one intentionally creates the appearance that a set of facts are true, when such facts are false, with intent to defraud another of his property, and succeeds, it is immaterial in prosecutions of the type involved whether the artifice is accomplished by means of words, acts, or both. State v. West, 252 N.W.2d 457, 462 (Iowa 1977); 35 C.J.S. False Pretenses § 18; Lee v. Commonwealth, 242 S.W.2d 984, 986 (Ky. Ct. App. 1951). In the present case, defendant's conduct was of a type clearly calculated to deceive the store employees into believing that defendant was authorized to return the merchandise with good title. The fact that the store employees, based upon information supplied to them by the true owner of the merchandise, were highly suspicious that the goods were those which had been reported stolen, does not preclude, as a matter of law, the finding by the jury that the store employees nonetheless relied at least partially upon defendant's conduct in paying out the money. As stated in People v. Phillips, 8 Cal. Rptr. 830, 834 (Cal. App. 1960):

> A partial investigation by the victim of false pretenses does not, as a matter of law, preclude reliance upon them; it merely presents a question of fact for the jury.

In the present case, the evidence fails to establish conclusively that the store employees knew with certainty that the goods being returned were the same goods reported as stolen. They only suspected (albeit strongly) that such was the case. The jury could reasonably find that, based upon established company policies, the sales clerks were obliged, under such circumstances, to take back the goods and pay over the money with no questions asked. Only after this occurred, did they verify with Patricia Mussig that these were her goods.

In this day of volume merchandising and resulting volume merchandise returns, it does not appear to be unreasonable for a retailer to adopt a fixed policy of accepting all

merchandise returns accompanied by the original sales slip on a "no questions asked" basis. The existence of such policies are doubtless well known to the general public, thus rendering these retailers likely targets of schemes of the type involved in the present case.

It appears to be well recognized that the operation of other inducements may combine with defendant's conduct to cause the victim to part with its property and yet justify a conviction of the statutory offense of false pretenses. State v. Fooks, supra at 198; 35 C.J.S. False Pretenses § 22 at 841. Here the company policy was such additional contributing inducement and serves to supply the element of reliance which the majority finds lacking.

The majority decision places an unreasonable burden on the State in proving reliance in the present case. The result of this burden is to excuse the very type of conduct the criminal statute was designed to punish as a result of factors having no bearing on the culpability of the accused. I do not believe defendant was entitled to a directed verdict or that there is any merit in any of the other assignments of error urged. The crime was complete upon defendant's receipt of the money. Patricia Mussig's title to the goods as true owner was superior to Sears. Northern Ins. Co. v. Miller, 256 Iowa 764, 129 N.W.2d 28 (1964). Sears was defrauded at this point and the fact that Sears may have later resold the goods is not material to defendant's guilt. I would affirm the judgment and sentence of the trial court.

DONIELSON, J., joins in this dissent.