FILED
MAY 31 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Appellee,

v.

ALLAN A. DiMARCO,

Appellant.

Filed May 31, 1978

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Appeal from Cerro Gordo District Court - John F. Stone, Judge.

Defendant appeals judgment and sentence following conviction for larceny. Affirmed.

Murray H. Finley, of Finley & Teas, of Mason City, for appellant.

Richard C. Turner, Attorney General, for appellee.

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

PER CURIAM

Defendant, Allan A. DiMarco, appeals from the August 30, 1977 judgment and sentence imposed against him for violation of § 709.4, The Code 1975, larceny in the nighttime. He challenges the sufficiency of the State's evidence to establish two elements of the crime: (1) the wrongful taking and carrying away of personal property of another; (2) nonconsent of the owner of the property. He also assigns as error the failure of the court to instruct the jury in the manner he requested.

On appeal the evidence presented is viewed in the light most favorable to the jury's verdict; it is necessary to consider only the evidence supporting the verdict, whether contradicted or not. The jury's finding is binding on this court if supported by substantial evidence. State v. Overstreet, 243 N.W.2d 880, 884 (Iowa 1976). The jury could find the facts to be as follows. Defendant DiMarco was employed as a part-time laborer by Hebel Grain International, Ltd., a corporation operating a grain elevator in Mason City, Iowa. Jack Brood was similarly employed on a full-time basis. Several times during the fall of 1976, DiMarco approached Brood and suggested they steal soybeans from the elevator. On January 29, 1977, DiMarco indicated to Brood that they should steal beans that day. That same day Brood informed the corporation's executive officer, Richard Hebel, that DiMarco had a plan to steal soybeans within the next three days. Hebel told Brood, "I'll handle it."

Hebel was uncertain how to react. The next morning, a Sunday, he telephoned Brood and was told that DiMarco planned to deliver the stolen beans to a local farmer, Joe Fett. Brood feared DiMarco. Hebel then telephoned a friend on the police force, Lefty Lewis, who placed him in contact with Duane Jewell, the deputy chief of the department. Jewell indicated that he would take care of the matter, and place the elevator under surveillance. Jewell believed the theft would probably occur on Monday night, January 31, 1977, coinciding with Hebel's annual party for full-time employees and customers. Brood received no instructions from Hebel; neither Brood or Hebel were instructed by the police.

No deliveries were planned for Monday evening and neither Brood nor DiMarco were authorized to take the company truck from the premises that night. On Monday

evening DiMarco and Brood were the only employees remaining on the job. DiMarco made a telephone call and then told Brood to load the company truck with soybeans. Brood did so. Neither Brood nor DiMarco were certain where Joe Fett's farm was located. Brood believed it was near Manley, Iowa. DiMarco drove the truck north of Mason City, toward Manley; the police followed, stopped the truck, and arrested DiMarco. The market value of soybeans taken was later determined to be more than $1700.

I. Defendant first challenges the sufficiency of the State's evidence to support the jury's finding that DiMarco had stolen, taken and carried away the soybeans from the property of Hebel. See §§ 709.1, .4, The Code 1975; State v. Jackson, 251 Iowa 537, 101 N.W.2d 731 (1960). He argues that because Brood, an assistant manager, was in the truck, the soybeans were never out of the possession of the corporation. Defendant's argument is without merit. Even if Brood could be found to have had custody of the soybeans, if he was not authorized to pass possession of them his consent to a taking of them will not prevent the taking from being larceny. State v. Aossey, 201 N.W.2d 731, 733 (Iowa 1972); State v. Smith, 200 Iowa 338, 339-40, 202 N.W. 511 (1925); 52A C.J.S. Larceny § 22 at 443-444. Because evidence supporting the verdict shows that Brood was neither authorized nor directed to give the beans to DiMarco, this question was for the jury and the court did not error in overruling the defendant's motion for directed verdict on this ground.

II. Defendant next argues that his motion for directed verdict should have been granted because the State failed to establish the owner's nonconsent to the taking. The owner's nonconsent has always been an indispensable element to the crime of larceny. State v. Potter, 195 Iowa 163, 191 N.W. 855 (1922). However, in this case we find no error in submitting the issue to the jury.

Defendant relies on State v. Durham, 196 N.W.2d 428, 430 (Iowa 1972). In reversing a larceny conviction in that case, the court relied upon the following statement appearing in the annotation at 10 A.L.R.3d 1126:

> It has been held that even though an accused conceives a larcenous scheme, where it becomes known to the property owner and the property owner informs the police and furnishes the property for taking so as to apprehend the accused, the owner thereby consents to the taking and the accused is not guilty of larceny.

In Durham, supra, according to the State's testimony, the defendant claimed to have a friend who knew where the mafia was hiding Billy Sol Estes's money. The defendant offered Thomas Geesaman the opportunity to double his money by paying "good money" for more of the Billy Sol Estes money. Geesaman initially accepted the offer but later informed an agent of the Iowa Bureau of Criminal Investigation (BCI). An envelope of money, prepared by the BCI and furnished to Geesaman for the purpose, was given to the defendant who was immediately arrested.

In the present case neither Hebel nor Brood furnished the beans to DiMarco in the manner that the BCI furnished a packet of money to Durham. Brood merely informed Hebel of the planned theft and Hebel informed the police. Brood was not directed to join with DiMarco for the purpose of apprehension. More properly applicable to the present case is another statement found at 10 A.L.R.3d 1131:

> It has been held that where police... with the knowledge of the owner of the property, merely furnish an opportunity for a dishonest person to take such property, and lie in wait in anticipation of his appearing and taking the property there is neither entrapment nor consent. (Citations).

See also, 52A C.J.S. Larceny § 24a at 444; 50 Am. Jur. 2d Larceny §§ 23-34 at 175-191. Sufficient evidence was presented by the State to generate a jury issue as to nonconsent.

III. Finally, defendant takes exception to the refusal of the trial court to give three requested instructions concerning taking away of property and nonconsent. The trial court instructed the jury on these issues in the manner recommended by Uniform Jury Instructions, 515.1 and 515.3. We find those instructions adequately apprised the jury of the elements of a "wrongful taking" in applying the definition of larceny, including the element of nonconsent. No error results from a mere failure to submit an issue in the form requested. State v. Lott, 255 N.W.2d 105, 108-09 (Iowa 1977); State v. Robinette, 216 N.W.2d 317, 318 (Iowa 1974).

We have considered all issues properly raised and finding no error we affirm.

AFFIRMED.