

IN THE COURT OF APPEALS OF IOWA

No. 0-499 / 09-1587
Filed August 11, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHRISTOPHER MARK EMERY,
Defendant-Appellant.

Appeal from the Iowa District Court for Clinton County, Charles H. Pelton,
Judge.

The defendant appeals his judgment and sentence for first-degree theft,
challenging the sufficiency of the evidence supporting the jury's finding of guilt.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and David Arthur Adams,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney
General, Michael L. Wolf, County Attorney, and Ross Barlow, Assistant County
Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.
Tabor, J., takes no part.

VAITHESWARAN, P.J.

A jury found Christopher Emery guilty of first-degree theft. Emery challenges the sufficiency of the evidence supporting the jury's finding of guilt, arguing the evidence did not establish he took property "from the person of another." See Iowa Code §§ 714.1(1), .2(1) (2009). A jury verdict will be upheld if substantial evidence supports the verdict. *State v. Smith*, 739 N.W.2d 289, 293 (Iowa 2007).

The jury was instructed the State would have to prove the following:

1. On or about the 22nd day of January, 2009, the defendant, Christopher Emery, took possession or control of a wallet and its contents from Kathy Baker's purse.
2. The wallet belonged to Kathy Baker at the time of the taking.
3. Christopher Emery took the wallet with the intent to deprive Kathy Baker of her wallet.
4. Kathy Baker's wallet was taken from her person at the time of the taking.

Emery takes issue with the fourth element. In his view, the State presented only speculative evidence that Baker's wallet was taken from her person. On this element, the jury was instructed: "Taking the property from the person . . . does not require that the property be taken from the body of the victim. However, it must be taken from the immediate presence of the victim."

In evaluating the evidence supporting this element, we are obligated to view it "in the light most favorable to the State" and consider "all legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence." *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984). Viewed in this fashion, the jury could have found the following facts.

Kathy Baker sought to cancel her day-old purchase of a vacuum cleaner. Two individuals, Christopher Emery and Max Hahn, came to her house to purportedly address the cancellation issue.

After Baker let the two men in, Hahn asked if he could demonstrate the vacuum to her by cleaning the mattress in her bedroom. Baker thought the request was odd, as he had done the same thing the day before when he sold her the vacuum. Nonetheless, she agreed. While Baker and Hahn were in the bedroom, Emery used the bathroom and went outside to get the old vacuum Baker had traded in.

The three reconnoitered in the kitchen. Baker's purse was sitting on a chair at the kitchen table. Emery was standing near Baker's purse and close to the back door of the house. Hahn stopped near the table and surprised Baker by giving her a hug. The two men immediately left through the back door.

The next day, Baker discovered that her wallet was missing from her purse. A police investigation revealed that Baker's credit card was used at a Wal-Mart. The store's surveillance tapes showed Emery using the card to buy several items including a case of Keystone Light beer, an Oral-B electric toothbrush, Edge gel, and Degree antiperspirant. A subsequent search of Emery's house turned up Baker's wallet, empty Keystone Light boxes, an Oral-B electric toothbrush, Edge gel, and Degree antiperspirant. A jacket similar to the one worn by Emery in the Wal-Mart surveillance tape was located in his vehicle.

Based on this evidence, there is no question that Emery took Baker's wallet. The only question is when. If he took it while Baker was in the bedroom with Hahn, it could not have been taken "from her person" as that term was

defined for the jury. On the other hand, if it was taken when Baker was in the kitchen, Emery essentially concedes it would have been taken “from her person.”

At trial, Baker was asked when she believed the wallet was taken. She testified, “I believe it was when they left the house. I believe that—that—when they were in the kitchen, then walked out the door.” Although Emery characterizes Baker’s assertion as pure speculation, circumstantial evidence supports a finding the theft took place at that point. See *State v. Moses*, 320 N.W.2d 581, 586 (Iowa 1982) (stating a jury verdict of guilty can be supported by circumstantial evidence alone). Specifically, a reasonable juror could have credited Baker’s assertion based on Hahn’s spontaneous and surprising hug, his height, which was enough to block Baker’s view of Emery, Emery’s position close to the purse and the back door, Baker’s opinion that he was unlikely to have taken the wallet earlier for fear she would notice it was gone, and the immediate exit of the two after what could only be viewed as a lengthy and circuitous means of effecting a cancellation of the vacuum-purchase agreement. While a reasonable juror could have contrarily found that Emery took the wallet while Baker was in the bedroom with Hahn,

a court “faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.”

State v. Bentley, 757 N.W.2d 257, 263 (Iowa 2008) (quoting *Jackson v. Virginia*, 443 U.S. 307, 326, 99 S. Ct. 2781, 2793, 61 L. Ed. 2d 560, 578 (1979)). We conclude the evidence raised a “fair inference of guilt” and did more “than create speculation, suspicion, or conjecture.” *Bass*, 349 N.W.2d 500–01.

In reaching this conclusion, we have considered Emery's argument that a theft in Baker's presence was inconsistent with Emery's modus operandi. In particular, Emery notes that the State charged him with two additional theft counts, both of which were dismissed on the ground that the purse owners were not in his presence at the time of the theft. However, a reasonable juror could have found that, unlike the evidence on those counts, the evidence here showed Emery in the immediate presence of Baker and the purse when the wallet was stolen. See *State v. Washington*, 308 N.W.2d 422, 422–23 (Iowa 1981) (upholding finding of guilt on a charge of theft from a person where a witness "observed the defendant approach the victim's shopping cart, surreptitiously remove a small brown billfold from her purse in the child carrier section of the cart, and place it in the pocket of his overcoat"); *State v. Marsan*, 221 N.W.2d 278, 280 (Iowa 1974) (finding an adequate factual basis for the defendant's guilty plea to larceny from the person where a "billfold was taken from the sidewalk at [the victim's] feet (after it mysteriously fell from his pocket)"); *State v. Kobylasz*, 242 Iowa 1161, 1168, 47 N.W.2d 167, 170 (1951) (affirming conviction for "larceny from the person" for taking a woman's wallet that was lying on a car seat between the defendant and the woman).

We affirm Emery's judgment and sentence for first-degree theft.

AFFIRMED.