IN THE COURT OF APPEALS OF IOWA

No. 9-963 / 09-0142
Filed January 22, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DALEVONTE DAVELLE HEARN,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mark D. Cleve, Judge.

A defendant appeals from his convictions for second-degree robbery, second-degree theft, and eluding. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Michael J. Walton, County Attorney, and Jerald Feuerbach, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

MANSFIELD, J.

Dalevonte Hearn appeals from his convictions following a trial to the court for second-degree robbery, second-degree theft, and felony eluding. He challenges the sufficiency of the evidence. Because we believe the evidence was sufficient to sustain all charges, we affirm.

I. Background Facts and Proceedings.

The evidence at trial showed the following: On September 18, 2008, Hearn was with his younger brother and his cousin at Hearn's home in Rock Island, Illinois. At some point, he drove his mother's green Oldsmobile into Davenport toward the cousin's home, which was located next to the Kimberly Road Wal-Mart. Hearn wanted to visit his girlfriend in Peoria, but his mother insisted that he return the Oldsmobile shortly.

That evening, Delores Morgan was parked in the lot for the Wal-Mart Supercenter on Kimberly Road in Davenport. She was eating a sandwich in her car. Two males approached her car. One went to the driver's side door and ordered her to "get out of the car" as the other entered the car through the passenger side door. As Morgan got out of the car, the male at the driver's side door demanded her car keys. Morgan testified she gave him her car keys out of fear.

According to the Wal-Mart surveillance video, which was entered into evidence, the carjacking occurred at 8:35 p.m. Two males can be seen entering the car, and Morgan leaving it. Approximately one minute later, the vehicle drives off.

Morgan testified, "I just kept walking to Wal-Mart and never looked back. And then when I got about halfway down there, I got my cell phone out and called 9-1-1." She reported that her car had been stolen and gave a description of the automobile—a red Pontiac Grand Am. Officers immediately headed to the scene. Several police officers testified at trial that the radio report of the carjacking went out "about 8:40 p.m." According to videos from various patrol cars that were introduced into evidence, the police response commenced at about 8:45 p.m.

At approximately 8:49 p.m., Officer Colclasure, driving westbound on Kimberly Road, saw a vehicle matching the description of Morgan's vehicle heading eastbound on Kimberly Road. That car, along with the other eastbound traffic, had stopped for the emergency sirens of the responding police vehicles, some of which were coming eastbound on Kimberly Road in the direction from the Wal-Mart. At the Pine Street intersection, the officer made a u-turn on Kimberly and began pursuing the red Grand Am eastbound on Kimberly with his lights and sirens activated. He also shined his spotlight into the Grand Am. The stolen vehicle, however, sped up to evade his squad car. In front of the stolen vehicle, Hearn was leading the chase in his mother's vehicle, the green Oldsmobile. Hearn admitted later that his brother and his cousin were the occupants of the stolen red Grand Am.

The pursuit continued. Both the green Oldsmobile, driven by Hearn, and the stolen red Grand Am turned south off of Kimberly and onto Division Street. With all the vehicles now heading south, the Grand Am pulled around Hearn's Oldsmobile after swinging into the northbound traffic lane of Division Street.

When Officer Colclasure attempted to do the same, Hearn pulled his own vehicle into the northbound lane to block Colclasure's pursuit of the stolen vehicle. By this time, multiple police cars had joined the pursuit with lights and sirens activated. During the pursuit, Hearn's vehicle reached speeds as high as ninety miles per hour, far in excess of the posted speed limit of thirty-five miles per hour.

Eventually Hearn's green Oldsmobile and the stolen red Grand Am pulled side by side and continued to outrun the police. However, they reached a construction zone where the southbound lanes had been closed with barricades and the northbound lanes had been set up to provide one lane of traffic in each direction. While traveling though the construction site, Hearn's Oldsmobile and the stolen Grand Am collided. The Grand Am careened across the northbound lane of traffic, over a residential fence, and crashed into the porch of a home. The occupants of the vehicle ran off and apparently were not apprehended. Hearn's vehicle briefly came to a stop, but Hearn got his vehicle moving again and the chase resumed with multiple police cars in pursuit. However, the tires on Hearn's Oldsmobile were severely damaged. Thus, his vehicle lost its maneuverability and speed.

As Hearn's vehicle rolled to a stop, Hearn jumped out and began running. His abandoned vehicle ran over a parking meter and came to a full stop. Hearn was caught by officers within a block of the abandoned Oldsmobile. Officers struggled to subdue Hearn. During this struggle Officer James Quick received an injury to his ankle that required seven stitches.

Although the victim (Morgan) did not see a weapon displayed during the carjacking, officers found an open-bladed pocket knife on the floor of the Grand

Am. In the vehicle driven by Hearn, officers found Hearn's brother's high school identification.

After being transported to the hospital and arrested, Hearn told officers that the two occupants of the stolen vehicle were his brother (fifteen years old) and his cousin (thirteen or fourteen years old). He admitted that he had met his brother and cousin at a house where his cousin lived next to the Wal-Mart store. He told the officers the green Oldsmobile he was driving belonged to his mother. He denied any knowledge of or involvement in the carjacking.

During trial, Hearn not only denied anything to do with the carjacking, he also disavowed his post-arrest statement that he had been aware his younger brother and young cousin were in the stolen red car.[1] He testified that he had driven his mother's green Oldsmobile to see his cousin and aunts at their home near the Wal-Mart store. However, he claimed he never reached the house. Rather, according to Hearn's trial testimony, he saw his brother and cousin outside that house, getting out of a red Monte Carlo (*not* a red Grand Am), but went on without talking to either of them. Hearn claimed he never noticed the Grand Am during the chase, even while blocking the police car that was trying to get it and while later speeding side by side with it, and had no idea who was driving it. He also claimed he did not know if there had been a collision between the Oldsmobile and the Grand Am, and did not know the Grand Am crashed into a home.

[1] As the district court observed in its findings, "[T]he Defendant's case consisted of his own testimony, which was, in most respects, flatly inconsistent with the story he provided in his post-arrest interview."

Furthermore, Hearn claimed that he was just driving along when he became aware that police officers were pursuing his car. He assumed that they did so because he had outstanding arrest warrants in Rock Island for attempted murder and aggravated battery concerning his former girlfriend. When cross-examined, he admitted his mother had loaned him her car for only a brief period of time, but testified he had wanted to go see his girlfriend, who was in the hospital in Peoria, Illinois.

At the conclusion of the evidence, Hearn was convicted by the district court of second-degree robbery in violation of Iowa Code sections 711.1 and 711.3 (2007), second-degree theft in violation of section 714.1(1) and 714.2(2), and eluding in violation of section 321.279(3). The following are some of the findings from the district court's opinion:

> The Court finds it helpful to first assess the Defendant's conduct immediately after the carjacking. As is clearly shown by the evidence, within minutes after the offense and while the carjacked vehicle was being actively pursued by the police, the Defendant's vehicle was immediately in front of the carjacked vehicle. Moreover, shortly after all of the above vehicles turned south on Division Street in a continued pursuit, the carjacked vehicle made an illegal pass of the Defendant's vehicle on the left, and as Office Colclasure attempted to move to the left to match that maneuver and keep immediately behind the carjacked vehicle, the Defendant plainly swerved his car into the northbound lane to block that pursuit.
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> Furthermore, shortly thereafter the Defendant's car and the carjacked vehicle began driving side by side on Division Street for an extended period as both of them sped away from the squad cars, before those two cars collided with each other in a construction zone. The Court determines these facts strongly support an inference that the Defendant and the occupants of the carjacked vehicle were acting in concert with each other, and that the Defendant was aiding and abetting them in that endeavor. The Court further determines that the Defendant's assertion that he just happened to be on the road at that exact place and time because he was traveling home to Rock Island after having visited with or

> having attempted to visit with family members who lived in the immediate area of the Wal-Mart, is categorically not credible. The Court instead finds that the Defendant's presence and activities during the pursuit of the carjacked vehicle instead prove that the Defendant aided and abetted [his brother and cousin] in the carjacking itself.
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> . . . .
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> In the present case it can be inferred that the Defendant aided and abetted the actual carjackers before and at the time the victim's vehicle was taken from her. The fact that [the brother's] high school ID was found in the car the Defendant had borrowed from his mother shows that [the brother] may have been in the Defendant's vehicle shortly before the carjacking took place. Moreover, the Defendant was significantly older than the two young teenagers involved, which tends to suggest that he may have been the moving force behind the plan to take the car. This inference is further buttressed by the Defendant's clear attempt to block the squad car's pursuit of the carjacked vehicle as that car attempted to outrun the police.
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> Furthermore, it is unlikely that the Defendant would have gone to all this trouble if he had merely intended to temporarily deprive Ms. Morgan of her car. Finally, the Defendant's admission on cross-examination that he planned to visit the girlfriend whom he had assaulted at the hospital in Peoria where she was receiving treatment for those injuries, in circumstances where the Defendant only had access to his mother's vehicle for a brief time, tends to show that the Defendant had a motive and a plan to take the victim's car to Peoria, Illinois.

These findings, in the court's view, warranted a guilty verdict on the robbery and theft charges. The court further found Hearn was guilty of eluding in that he

> eluded or attempted to elude a marked law enforcement vehicle driven by a uniformed peace officer after being given a visual and audible signal to stop, that in so doing he exceeded the speed limit by twenty-five miles per hour or more, and that at such time the Defendant was participating in the felonies of [second degree robbery and second degree theft].

Alternatively, the court found Hearn guilty of eluding under the alternative which requires a finding of bodily injury to a person other than the defendant, since Officer Quick suffered a gash to his ankle in the course of apprehending Hearn.

The district court sentenced Hearn to ten years in prison and five years in prison for the robbery and theft convictions, to be served concurrently, and five years in prison for the eluding conviction to be served consecutively. Hearn appeals and challenges the sufficiency of the evidence.

II. Scope of Review.

We review challenges to the sufficiency of the evidence for correction of errors at law. Iowa R. App. P. 6.907; *State v. Rohm*, 609 N.W.2d 504, 509 (Iowa 2000). The district court's findings of guilt are binding on appeal if supported by substantial evidence. *State v. Hansen*, 750 N.W.2d 111, 112 (Iowa 2008). "Substantial evidence means evidence that 'could convince a rational trier of fact that a defendant is guilty beyond a reasonable doubt.'" *State v. Williams*, 674 N.W.2d 69, 71 (Iowa 2004) (quoting *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998)). The evidence must "'raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture.'" *Id*. (quoting *state v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981)). We view the evidence in the light most favorable to the State. *Id*.

III. Sufficiency of the Evidence.

A. Robbery and Theft.

Hearn first argues that there was insufficient evidence he aided and abetted his brother and cousin in the offenses of second-degree robbery and second-degree theft.[2] The district court found that Hearn's brother and cousin

[2] Iowa Code section 703.1 provides, "All persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense or aid and abet its commission, shall be charged, tried and punished as principals."

committed robbery and theft. Hearn does not contest that. Rather, Hearn argues that there was not sufficient evidence he participated in the crimes.

> To convict one of a crime on the theory of aiding and abetting, the State must produce substantial evidence that the accused assented to or lent countenance and approval to the criminal act either by active participation in it or by some manner encouraging it prior to or at the time of its commission. It is true the State must prove the accused knew of the crime at or before its commission. But such proof need not be—and frequently cannot be—established by direct proof. The proof may be either direct or circumstantial.
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> Although such knowledge is essential, neither knowledge nor proximity to the scene is—standing alone—enough to prove aiding and abetting. But . . . such factors in combination with circumstantial evidence such as presence, companionship, and conduct before and after the offense is committed may be enough from which to infer a defendant's participation in the crime.

State v. *Lewis*, 514 N.W.2d 63, 66 (Iowa 1994) (internal citations and quotations omitted).

We believe substantial evidence supports the district court's conclusion that Hearn aided and abetted the carjacking, and thus that he was guilty of second-degree robbery and theft. Hearn had a motive to steal a car: He needed transportation to visit his hospitalized girlfriend in Peoria (approximately a hundred miles from his home in Rock Island) and his mother's car was not available to him for this trip. Hearn admittedly had been with the two carjackers that day. As the district court noted, Hearn was substantially older than them and, therefore, it is reasonable to infer that he orchestrated the carjacking in order to obtain the vehicle he needed. It was logical for Hearn to delegate the actual carjacking to two juveniles who presumably did not have Hearn's record of prior brushes with the law. Minutes after the carjacking, the two cars were heading east in tandem on Kimberly Road. At this point, the plan presumably

was to drop the green Oldsmobile and the youths back in Rock Island and for Hearn to continue in the stolen Grand Am to Peoria. The videos show Hearn in the Oldsmobile clearly trying to block police pursuit of the Grand Am and then acting in concert with his brother and cousin to outrun the officers. It is reasonable to conclude that Hearn took these actions because he had been part of the plan that resulted in the carjacking of the Grand Am.

Additionally, we have Hearn's highly implausible explanation of events at trial, a story that also contradicted his post-arrest statement in several respects. Hearn claimed he had no idea who was in the stolen Grand Am, despite previously admitting it was his brother and cousin. He claimed he never realized the police were pursuing the Grand Am and, in fact, never even noticed the Grand Am even while speeding side by side with it down Division Street. We agree with the district court that Hearn's trial testimony was inconsistent with the story he told officers after his arrest and was not at all believable. *See State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993) ("A false story told by a defendant to explain or deny a material fact against him is by itself an indication of guilt and the false story is relevant to show that the defendant fabricated evidence to aid his defense."). We find there is sufficient evidence Hearn aided and abetted in the crimes of second-degree robbery and second-degree theft.

B. Felony Eluding.

Hearn next argues that there was insufficient evidence of felony eluding pursuant to Iowa Code section 321.279(3). This section provides, in relevant part:

> The driver of a motor vehicle commits a class "D" felony if the driver willfully fails to bring the motor vehicle to a stop or otherwise eludes or attempts to elude a marked official law enforcement vehicle that is driven by a uniformed peace officer after being given a visual and audible signal as provided in this section, and in doing so exceeds the speed limit by twenty-five miles per hour or more, and if any of the following occurs:
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> a. The driver is participating in a public offense, as defined in section 702.13, that is a felony.
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> . . . .
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> c. The offense results in bodily injury to a person other than the driver.

Iowa Code § 321.279(3). The district court found Hearn guilty under both alternatives (a) and (c). On appeal, Hearn does not dispute that he tried to elude a police officer and in doing so exceeded the speed limit by more than twenty-five miles per hour. The only arguments he raises on appeal concern the additional elements required for alternatives (a) and (c). Specifically, Hearn denies he was still participating in a felony at the time of the eluding, as required for alternative (a).[3] Additionally, Hearn denies that alternative (c) applies because Officer Quick's injury, in his view, did not result from the eluding incident, but rather from the subsequent chase on foot.

We first examine whether Hearn was participating in a felony. Hearn argues the "perpetrators had successfully taken possession and control of the victim's car and fled the Wal-Mart parking lot"; they had escaped the scene of the crime and as a result, the robbery and theft were completed by the time the police officers pursued the defendants car. "Therefore, we must decide if the evidence supports [Hearn's] claim on appeal that . . . the public offense of the

[3] Hearn's argument is that even if sufficient evidence connected him to the carjacking, those felonies had terminated before any eluding began.

motor vehicle theft terminated sometime earlier, prior to the eluding incident." *State v. Philo*, 697 N.W.2d 481, 487 (Iowa 2005).

> A person is "participating in a public offense," during part or the entire period commencing with the first act done directly toward the commission of the offense, and for the purpose of committing that offense and terminating when that person has been arrested or has withdrawn from the scene of the intended crime and has eluded pursuers, if any there be.

Iowa Code § 702.13. Further, our supreme court has discussed when participation in a public offense terminates.

> An arrest for a public offense occurs when an accused is taken into custody. This can take place at the crime scene or any later time and place. However, it is clear our legislature, from its inclusion of the second part of the termination point in the definition of "participating in a public offense," intended to limit the concept to prevent it from being extended days, weeks, or even months beyond the commission of the offense. This termination point generally is limited to withdrawal from the crime scene and is only extended beyond the crime scene in the event the accused, who has not been arrested, is pursued. Thus, once a participant in a public offense has left the crime scene and has eluded any pursuers, the person is no longer "participating in a public offense" under the statute. Likewise, once a participant has left the crime scene without any pursuers, the person is no longer "participating in a public offense."

Philo, 697 N.W.2d at 487 (citations omitted).

The evidence demonstrated the carjacking occurred in the Wal-Mart parking lot on Kimberly Road. As the victim walked away from the car toward Wal-Mart, she got out her cell phone, called 911, and reported the crime and described her car. Immediately officers raced toward the scene. Within minutes, one officer, who was already in the area and traveling west on Kimberly Road, spotted the stolen vehicle traveling east on Kimberly Road and began pursuing the stolen vehicle. At most, it appears that some distance along Kimberly Road

and ten minutes of time separated the pursuit of the two cars from the initial carjacking itself.

This case is a far cry from *Philo*, where the defendant stole a car in Buchanan County and later that day tried to elude police in Black Hawk County, after a random license plate check showed the vehicle was reported as stolen. *Id*. at 487-88. Here, the defendant was trying to elude police officers who were reporting to the crime scene in response to the initial report of the crime. To put it another way, where the underlying crime is a carjacking, we think it is reasonable to conclude that a defendant has *not* successfully left the crime scene without pursuers when he has only driven out to the street that fronts the parking lot on which the incident occurred and is thereupon confronted by a responding police officer.

Moreover, the court's language of *Philo* is actually a *paraphrase* of the underlying statutory language in Iowa Code section 702.13. The difference between the two did not matter in *Philo*, but to the extent it matters here we defer to the actual words used by the Iowa legislature. Section 702.13 states that participation in a public offense ends when the defendant "has withdrawn from the scene of the intended crime and has eluded pursuers." This language does not require the pursuers to have begun chasing the defendant at the crime scene; at most, we believe, it requires the pursuers to have responded to the initial crime report and to have been directed to the crime scene, as occurred here.

Because we find sufficient evidence established felony eluding pursuant to the public offense alternative, we need not address Hearn's claim regarding the bodily injury alternative.

For the foregoing reasons, we affirm Hearn's convictions.

AFFIRMED.