

FILED

AUG 26 1982

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Filed August 26, 1982

Plaintiff-Appellee,

)

366

vs.

)

2-164
67049

DONALD LEROY HALL,

)

Defendant-Appellant.

)

Appeal from Webster District Court, Newt Draheim, Judge.

Defendant appeals from his conviction of theft in the second degree under section 714.1 and 714.2(2), The Code 1981. Defendant asserts the testimony by the owner of the stolen van improperly exceeded the minutes of testimony.
REVERSED AND REMANDED FOR NEW TRIAL.

Mark S. Cady of Mitchell, Coleman, Perkins & Enke, Fort Dodge, for defendant-appellant.

Thomas J. Miller, Attorney General, and Roxann M. Ryan, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

Defendant appeals from his conviction of theft in the second degree under section 714.1 and 714.2(2), The Code 1981. Defendant asserts, as one of six reversible errors committed during trial, the testimony by the owner of the stolen van improperly exceeded the minutes of testimony. Since we find the testimony of the van's owner improperly exceeded the minutes of testimony, and defendant was thereby prejudiced, we reverse defendant's conviction without discussion of the merits of the remaining issues assigned as error.

On February 3, 1981, the Fort Dodge Police received a report that a van had been stolen from a used car lot. Shortly thereafter, a Fort Dodge policeman saw a van matching the description of the stolen van. The officer stopped the van and arrested the driver-defendant in this case, Donald LeRoy Hall. Defendant was then charged with second-degree theft in violation of sections 714.1 and 714.2(2), The Code 1981. He was convicted by jury of that crime.

Defendant claims his conviction should be reversed on the basis of several errors committed during trial. Defendant initially argues the testimony of the van's owner exceeded the minutes of testimony attached to the information. The minutes indicated Charles J. Wright, the owner of the van, would testify as follows:

that on February 4, 1981, he was engaged in the used car sales business located next to his residence; that on that date he owned a 1975 Ford Van; that on that date the Defendant had no right, license or privilege to take possession of said vehicle. The witness will testify as to further facts and circumstances.

At trial, Mr. Wright testified to the fact fuel had been put into the gasoline tank and he had seen burglary tools in the rear of the van.

Defendant claims the testimony of Mr. Wright prejudicially exceeded the scope of testimony defined by the minute. He claims the minute established Mr. Wright would testify only to the fact defendant was not properly in possession of the van owned by Mr. Wright. Defendant asserts the testimony defined by the minute bears only upon the essential element of possession without permission of property owned by another but that it does not provide any evidence from which any intent on the part of defendant to permanently deprive the owner of the property could be inferred. Mr. Wright's actual testimony at trial, however, is argued by defendant as establishing the essential element of intent to permanently deprive the owner of the property. For that reason, defendant claims he was surprised by the substance of Mr. Wright's testimony on defendant's intent and was deprived of a fair opportunity to conduct an investigation for evidence to rebut that testimony.

Defendant's argument raises two issues: (1) Did Mr. Wright's testimony exceed the scope of the minutes and (2) If it did, was admission of the testimony prejudicial.

Iowa R. App. P. 5(3) requires the prosecuting attorney to file, along with the information, the minutes of evidence including a full and fair statement of each witness's expected testimony. In State v. Walker, 281 N.W.2d 612, 613 (Iowa 1979), the minutes of testimony for one witness indicated he would testify to seeing defendant in a tire store looking at tires of the type that were subsequently stolen. The State, at trial, elicited testimony from that witness that established there was no receipt or other evidence of sale. The court stated: "The purpose of this testimony was to negate any notion that defendant had purchased the tires.

The State admitted this evidence was necessary to show there had been a theft and not a sale." Id. Thus, the evidence was admitted to establish the occurrence of a theft versus a sale, but the minutes acted only to place defendant in the store at the relevant time. The court held the minutes, therefore, under the facts presented, did not provide a full and fair statement of the witness's testimony. Id.

We think this case presents a situation similar to State v. Walker. The minutes of Mr. Wright's testimony indicated only that Mr. Wright would testify defendant did not have the owner's permission to possess the van. They did not indicate Mr. Wright would testify to any evidence from which the inference of defendant's intent to permanently deprive the owner of the property could be made. Evidence of intent to permanently deprive the owner of property is an essential element of theft. Since the testimony of Mr. Wright tended to establish an element of theft different from the element that the minutes indicated would be proved by his testimony, we conclude the minutes failed to provide defendant with a fair, and especially, a full statement of the witness's expected testimony.

We conclude further defendant was prejudiced by the State's error. In State v. Jeffs, 246 N.W.2d 913, 917 (Iowa 1976), the court stated "Erroneous admission of evidence is presumed prejudicial unless the contrary is affirmatively shown." In Blackwell v. Brewer, 562 F.2d 596, 599 (8th Cir. 1977), the court stated, "The burden of proving harmless error is a heavy one and the State must so prove beyond a reasonable doubt." (citing Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). We are of the opinion the State failed to carry its burden to affirmatively establish the absence of prejudice. As defendant argues, had he known Mr. Wright would testify to evidence indicating his intent, he could

have undertaken discovery, investigated facts concerning the witness's credibility and sought other evidence to undercut the effect of the witness's testimony. While the State argues there was sufficient evidence to establish intent, other than Mr. Wright's testimony, that is not sufficient to overcome the presumption of prejudice. Accordingly, we reverse the defendant's conviction and remand for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.