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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed October 18, 1979

vs.)

RICHARD A. THOMAS) 257
62908

Defendant-Appellant.)

Appeal from Marshall District Court - Roger R. Halleck, Judge.

Defendant appeals conviction for theft in the third degree in violation of section 714.2(3), The Code 1977, alleging trial court erred in admitting testimony on the purchase price and date of the allegedly stolen property. - Reversed and Remanded.

Bruce P. Bickel, Ames, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

OXBERGER, C.J.

Defendant Richard A. Thomas appeals conviction for theft in the third degree in violation of section 714.2(3), The Code 1977. Reversed and remanded.

Defendant Richard A. Thomas appeals a Marshall County jury verdict finding him guilty of theft in the third degree. On appeal, he asserts the trial court erred by admitting testimony on the purchase price and purchase date of a police scanner, (hereinafter referred to as radio) which according to stipulation of the parties, was pawned by the defendant two weeks after it was stolen. Defendant claims the remaining evidence introduced at trial was insufficient to establish that the value of the item stolen was more than $100 and he therefore asserts all elements necessary for conviction of theft in the third degree were not proven.

Section 714.2(3) defines theft in the third degree as theft of property valued in excess of $100 but not more than $500. Section 714.3 states property will be valued at its "normal market or exchange value within the community at the time that it is stolen." As indicated by the language of section 714.3, the jury's task is to determine the stolen property's market value, not its actual cost or special value to its owner. See generally 50 Am. Jur. 2d Larceny § 45 (1970). This market value may be ascertained under rules generally applicable to civil cases. State v. Boyken, 217 N.W.2d 218, 221 (Iowa 1974). In Ludvich v. Insurance Co., 128 Iowa 376, 378, 104 N.W. 429, 430 (1905), the court said:

> . . . it is fundamental that evidence of its value at some other place and time is incompetent, unless it was also shown that its value at both times and places was practically the same, or unless the difference in value, if any was pointed out.

In this case, the State through its witness Joe Paglia, established the market wholesale value of the radio as $50 and retail as $75. However, the State's case for third degree theft was based on showing a market value of $100. The State desired to show the market value of $100 or more by establishing its purchase price of $340 and allow the jury to use its common sense to determine its market value at the time it was stolen. The court in Ludvick stated evidence of its value at any other time or place is not competent unless certain foundation conditions are met. Here, the State did not establish foundation requirements showing the market value on the date stolen was the

same on the date purchased. The State could not prove the similarity because there is no similarily. The purchase price was for new equipment with warranty. The radio was used equipment when stolen, without a warranty. State witness Darrell Campbell testified he wouldn't buy the radio without a warranty. State witness Perin testified "I have been selling stuff for ten years. There is a big difference between the retail value and what its worth second hand."

We hold the State failed to establish the necessary foundation requirements under Ludvick to render competent, testimony of the purchase price of the radio.

Defendant asserts the remaining competent evidence introduced at trial was insufficient to support the conviction for theft in the third degree. He claims the proof did not establish the stolen radio's market value was greater than $100 and he alleges the State failed to prove all elements of the offense. The evidence introduced by the State relative to the radio's market value consisted of the pawn broker's testimony that the radio had a value of $50 wholesale and $75 retail. Police officer James Perin testified defendant told him that he obtained the radio from a person who owed him money. The officer testified the defendant said he cancelled a $150 debt and paid an additional $50 to that person thereby bringing the total paid for the radio to $200. The officer said defendant told him that he thought he had bought it cheap - that it's value was between $300 and $350.

We find this evidence sufficient to support the jury verdict of guilt of third degree theft. However, because we find error in the admission of the evidence of actual value, we reverse and remand for a new trial.

REVERSED AND REMANDED.

All judges concur, except Donielson, J., and Carter, J., who dissent.

DONIELSON, J. (dissenting)

I dissent. While I agree with the dissent of Judge Carter, I would like to make one additional point. The majority in its reversal fails to discuss or distinguish two cases, which in my view, would require us to affirm the trial court's ruling and the jury's guilty verdict. In State v. Beyken, 217 N.W.2d 218, 220 (Iowa 1974), and State v. Long, 256 Iowa 1304, 1310, 130 N.W.2d 663, 666 (1964), the Supreme Court of Iowa stated that evidence of the selling price of stolen new merchandise was admissible as bearing on its fair market value. Although the radio stolen here was not new, it was only four months old. Its retail price would certainly be relevant to its market value, although not necessarily conclusive. Relevant evidence is evidence having any tendency to make any fact of consequence to the determination of the action more or less probable than it would be without the evidence. Carson v. Mulnix, 263 N.W.2d 701, 706 (Iowa 1978); Kalianov v. Darland, 252 N.W.2d 732, 735 (Iowa 1977). The retail sales price of the radio four months prior to its theft would thus be relevant to its market value at the time of the theft. Considering the scanty evidence of a regular market for used radios and the difficulty in arriving at a reasonable market value, the retail sales price, in fact, may be one of the more reliable sources of information regarding market value and was properly admitted.

CARTER, J. (dissenting)

I dissent. The issue concerns whether the purchase price and purchase date of personal property is competent, material evidence for the jury to consider, along with the other evidence of value, in determining the market value of the property at some later date. In the absence of such remoteness as to make this evidence absolutely untrustworthy, a situation which I do not find to exist in the present case, I believe that such evidence should be admissible for this purpose. In any event, I would find that this evidence is not sufficiently prejudicial to require reversal.

The majority correctly states that market value of stolen property for purposes of the criminal statute involved in the present case is to be determined under rules generally applicable in civil cases. Actually, the rules of proof of such values in civil cases are extremely liberal. Evidence of the type involved in the present appeal may generally be used either for a source of information upon which to base valuation testimony, Johnson v. Scott, 258 Iowa 1267, 1270, 142 N.W.2d 460, 462 (1966), or as substantive evidence of value, Conditioned Air Corp. v. Rock Island Motor Transit Co., 253 Iowa 961, 966, 114 N.W.2d 304, 308 (1962). Based upon these authorities, I find no cause for reversing the judgment of conviction as a result of admitting the evidence of purchase price and purchase date of the stolen property.