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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed November 30, 1987

vs.) 301

DAVID HARKEMA,) 7-307
86-1871

Defendant-Appellant.)

Appeal from the Iowa District Court for Mahaska County (No. 5234), James D. Jenkins, Judge.

Defendant appeals from conviction of first-degree theft, claiming the trial court erred in refusing to instruct on lesser-included degrees of theft and in allowing into evidence over defendant's objection the search warrant issued for a search of his premises. **REVERSED AND REMANDED.**

David D. Dixon of Heslinga, Heslinga & Dixon, Oskaloosa, for defendant-appellee.

Thomas J. Miller, Attorney General of Iowa; Bruce Kempkes, Assistant Attorney General; and Charles Stream, County Attorney; for plaintiff-appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

Defendant, David Harkema, appeals his conviction of first-degree theft in violation of Iowa Code section 714.1(4) (1985). He asserts the trial court erred in allowing into evidence over his objection the search warrant issued to search his business premises. He also asserts the trial court erred in refusing to instruct the jury on more than one lesser-included degree of theft.

Harkema contends the district court erred in allowing into evidence a search warrant associated with the discovery of incriminating evidence. He argues the warrant was irrelevant, prejudicial, and hearsay. His objection at trial was as follows:

> Your Honor, I would have no objection to the reception into evidence of page 2 of State's No. 5, which would appear to be the inventory according to the testimony of this officer.
>
> Page 1 being a photocopy of the search warrant itself, I would object to as being irrelevant and immaterial first of all.
>
> Secondly, I would object to it as—on the basis of any probative value would be outweighed by the prejudicial effects thereof for the reason this would appear to reflect and contain on the first page or the front of the warrant itself conclusions of law from some person other than the witness who is testifying at this point in time. (Emphasis added to alleged hearsay objection.)

As an initial matter, the State asserts the alleged hearsay objection was not sufficiently specific to alert the trial court to the hearsay issue. The State contends, therefore, any error on the issue was not preserved.

It is well-settled law that objections to evidence must be sufficiently specific to inform the trial court of the basis for objecting. State v. Farni, 325 N.W.2d 107, 109 (Iowa 1982). Stated another way, an objection is sufficient if it calls the trial court's attention to the claimed inadmissibility or incompetency involved. State v. Evans, 193 N.W.2d 515, 518 (Iowa 1972).

The State notes the objection would have been properly preserved if Harkema's counsel had simply stated the word "hearsay." We agree, but that does not resolve the issue of whether what counsel actually said was sufficiently

specific to alert the trial court to the hearsay problem. Hearsay is defined in our rules as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. of Evid. 801(c). Harkema's counsel objected to the reception into evidence of page one of the search warrant because it contained "conclusions of law from some person other than the witness who is testifying at this point in time." Harkema asserts this objection "mirrors" the definition of hearsay and thus should have alerted the trial court. We agree. Although preferable, it is not required the word "hearsay" be used to make a hearsay objection, as long as the language used conveys the same meaning. We conclude it clearly did in this case.

The State asserts, even if the objection was properly made, the reception into evidence of the search warrant was not error or the error was harmless. The State concedes page one of the search warrant could not have been offered to prove the truth of the matter asserted, but contends it could have been offered to show the police officers held legal authority to search Harkema's business. We note, however, page one of the search warrant was merely offered in conjunction with page two, which contained an inventory of the items seized. The testimony accompanying the offer of the search warrant related to this inventory and not the officer's legal authority. We also note Harkema did not object to page two. It is clear page one was not offered for the limited purpose the State now speculates would have been proper.

Page one of the search warrant stated, in pertinent part:

> Proof having been this day made before me as provided by law that: Black 305 Chevrolet V-8 engine and Chevrolet automatic transmission for a 4-wheel drive pickup truck is being kept at the business known as Harkema Chevrolet being the first business on the west side of Highway 63 South of New Sharon, Iowa in the possession of David Harkema and persons unknown is held in violation of the laws of Iowa.

Just as an arrest warrant cannot be admitted into evidence to prove flight, see State v. Reitenbaugh, 392 N.W.2d 486, 489-90 (Iowa 1986), a search warrant cannot be admitted into evidence to prove wrongful possession. The reception into evidence of page one of the search warrant effectively accomplished this proscribed purpose. Its terms clearly state proof sufficient to satisfy a magistrate was shown that Harkema was in possession of certain goods in violation of the law. We find page one was offered to prove the truth of this assertion. We conclude the trial court's failure to sustain Harkema's hearsay objection was error.

The State contends any error was harmless. The erroneous admission of hearsay is presumed to be prejudicial unless the contrary is affirmatively established. State v. Sowder, 394 N.W.2d 368, 372 (Iowa 1986). However, erroneously admitted evidence will not be considered prejudicial where substantially the same evidence is in the record. State v. Gilmore, 259 N.W.2d 846, 858 (Iowa 1977).

The State asserts the information contained in the warrant had already been presented to the jury by the officer on direct examination without objection and was therefore cumulative. We disagree. The officer testified as to the items listed in the inventory on page two of the search warrant. He did not testify as to the magistrate's conclusions on page one. The information contained on page one of the search warrant was not, therefore, cumulative or substantially the same as other evidence in the record.

The essence of Harkema's defense at trial was that he did not exercise control over the vehicle admittedly stolen by employees of his business. The erroneous admission of page one of the search warrant provided the jury with evidence that this defense had already been rejected by one member of the

judiciary. We do not consider this harmless. We therefore reverse and remand for a new trial.

Harkema also asserts the trial court erred in refusing to instruct the jury on more than one lesser-included degree of theft. An instruction on a lesser-included offense is appropriate when the elements of the lesser offense are an elementary part of the greater offense and there is a factual basis for the instruction in the record. State v. Thongvanh, 398 N.W.2d 182, 189 (Iowa App. 1986). The inquiry into the factual basis entails an ad hoc determination. State v. Wales, 325 N.W.2d 87, 88 (Iowa 1982).

In this case, the jury was instructed only as to first- and second-degree theft, since the trial court concluded Harkema could only be found guilty or not guilty of exercising control over the entire vehicle stolen. Harkema asserts the jury could have concluded he exercised control over only part of the vehicle, after it had been stripped down. The State's response is that the factual basis test was not satisfied, since no evidence was introduced on the value of these parts.

We have concluded Harkema is entitled to a new trial. It is not clear whether evidence as to the value of these parts will be introduced at the new trial, if held. We therefore decline to decide whether the jury was properly instructed on lesser included degrees of theft.

REVERSED AND REMANDED.