IN THE COURT OF APPEALS OF IOWA

No. 8-086 / 97-0554

FILED
APR 24 1998
CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

BART STANLEY KERNS,

Defendant-Appellant.

Appeal from the Iowa District Court for Madison County, James W. Brown, Judge.

Bart Kerns appeals from his conviction, following a jury trial, for first-degree theft in violation of Iowa Code sections 714.1 and 714.2(1) (1997). **AFFIRMED IN PART; MODIFIED IN PART; AND REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, and A. Zane Blessum, County Attorney, for appellee.

Heard by Sackett, P.J., and Vogel and Mahan, JJ.

SACKETT, P.J.

Defendant-appellant Bart Stanley Kerns appeals following his conviction, following a jury trial, of first-degree theft in violation of Iowa Code sections 714.1 and 714.2(1) (1997). He challenges the admission of certain hearsay evidence and the trial court's ruling on his motion for mistrial. We affirm in part, modify in part, and remand for resentencing.

Defendant was charged with stealing a pick-up from Acheson Collision Center in Des Moines. Defendant contends the trial court abused its discretion in allowing hearsay evidence establishing the pick-up's value under the business exception rule.

The challenged evidence is a bill of sale from the Des Moines Auto Auction for the pick-up defendant was charged with stealing. The bill of sale was admitted through the testimony of Blaine Lowden, a seven-year employee of Acheson. The record shows Acheson purchases vehicles, such as the pick-up, and makes files on the vehicles purchased, which were maintained by John Robinson. Included in the file on this particular pick-up was the challenged bill of sale showing Acheson purchased the pick-up in the Fall of 1995 from the Des Moines Auto Auction for $11,000. All people in Acheson's body shop, including Lowden, had access to this file.

The bill of sale was hearsay evidence. *See State v. Horn*, 282 N.W.2d 717, 724 (Iowa 1979). Hearsay statements are not admissible unless the statements are subject to an exception listed in Iowa Rule of Evidence 803 or 804. *See State v. Reitenbaugh*, 392 N.W.2d 486, 489 (Iowa 1986).

The foundation elements which must be proved prior to admission of the evidence under the business records exception are as follows:

> 1. It is a business record;
> 2. It was made at or near the time of an act;
> 3. It was made by, or from information transmitted by, a person with knowledge;
> 4. It was kept in the course of a regularly conducted business activity; and
> 5. It was the regular practice of that business activity to make such a business record.

Beachel v. Long, 420 N.W.2d 482, 484 (Iowa App. 1988). The court must have proof to make a finding the necessary elements are present. *In re Delaney*, 185 N.W.2d 726, 731 (Iowa 1971).

We review for an abuse of discretion. *State v. Anderson*, 159 N.W.2d 809, 814 (Iowa 1968). We give this exception a broad, liberal interpretation. *State v. Lain*, 246 N.W.2d 238, 242 (Iowa 1976); *State v. Fisher*, 178 N.W.2d 380, 382 (Iowa 1970).

Defendant contends because Lowden was a mechanic, he was not a proper witness to lay the foundation for the document to be admitted as a business record. Defendant further contends Lowden was not the designated record keeper. Defendant therefore contends Lowden was unable to testify as to record keeping practices at Acheson. Defendant also advanced at trial and advances here that the bill of sale was generated by Des Moines Auto Auction and no witness from Des Moines Auto Auction testified it was kept in the regular course of its business.

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Lowden's testimony showed he had knowledge of the record keeping practice of Acheson and knew how these records were kept. This proof may have been sufficient to establish the general bookkeeping practices of Acheson. *Fisher*, 178 N.W.2d at 383. However, the challenged bill of sale was not prepared in the course of Acheson's business. The bill of sale was a business record of the Des Moines Auto Auction. Lowden was not a party to the sale and could not identify who prepared the bill of sale nor could he vouch for the basis of the information. Lowden had no knowledge of the business practices of Des Moines Auto Auction.

There is no evidence the bill of sale was made in the regular course of Des Moines Auto Auction's business at or about the time the sale was made or of the sources of information from which the bill of sale was made or the method and circumstances of its preparation. Such evidence missing, we find the bill of sale was inadmissible. *See Lain*, 246 N.W.2d at 242.

Defendant contends he was prejudiced by the admission. The State contends he was not. Generally, the admission of hearsay evidence is presumed prejudicial. *State v. McKettrick*, 480 N.W.2d 52, 60 (Iowa 1992). The State contends the bill of sale does not impact on the jury's finding defendant stole the pick-up. The State admits the evidence does go to value and the degree of the offense.

We agree defendant was prejudiced only to the degree of the offense. The State has proved defendant stole a motor vehicle in violation of Iowa Code section 714.1. However, the State failed to prove the value of the pickup exceeded $10,000.

We therefore affirm defendant's conviction of theft in violation of Iowa Code section 714.1, and modify the conviction of defendant of first-degree theft to second-degree theft in violation of Iowa Code section 714.2(2).

Defendant moved for a mistrial after Madison County Deputy Sheriff Bill Bartelson testified defendant refused to give him a written statement after Bartelson informed defendant of his right under Miranda.

The district court struck the statement and cautioned the jury concerning the statement. The district court further told the jury any defendant has a right not to answer questions from law enforcement or provide them with a statement, and whether or not defendant gave or refused to give a statement has no basis. Any error was corrected by the trial court's instruction. *See State v. Baccam*, 476 N.W.2d 884, 886 (Iowa App. 1991). We find the trial court did not abuse its discretion in refusing to grant a mistrial. *Id.* at 887.

We remand this case to the district court for resentencing. We do not retain jurisdiction.

AFFIRMED IN PART; MODIFIED IN PART; AND REMANDED FOR RESENTENCING.