FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed October 23, 1984
vs.	)	
MARSHA ANN MULLIGAN and JACK EAKINS,	)	4-176 83-366 & 83-565
Defendants-Appellants.	)	

Appeal from the Iowa District Court for Mahaska County - James D. Jenkins, Judge.

Defendants appeal from their conviction for theft in the third degree in violation of Iowa Code sections 714.1(1) and 714.2(3). REVERSED AND REMANDED FOR A NEW TRIAL.

Charles Harrington, Appellate Defender, and Fern S. Shupeck, Assistant Appellate Defender, for defendant-appellant.

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

Heard by Donielson, P.J., Schlegel, and Hayden, JJ.

HAYDEN, J.

Defendants appeal from their conviction for theft in the third degree in violation of Iowa Code sections 714.1(1) and 714.2(3).

Defendants were jointly tried and convicted of stealing eight feeder pigs from a nearby farmer. The farmer, Wilmore Walston, discovered that the pigs were missing and subsequently identified as his the eight pigs defendants had offered for sale at a local sale barn. Defendant Mulligan testified that the pigs had been raised by defendants on their farm.

Walston's identification of the pigs was based upon general breed characteristics rather than on individual marks or tags. On direct examination he asserted that he had never thought any more than eight pigs were missing from his farm. However, in a written statement given to the police prior to visiting the sale barn, Walston stated that eight or nine pigs had been stolen. The trial court denied defense counsel the opportunity to cross-examine Walston concerning the written statement; however, the statement was later admitted into evidence.

The buyer of the pigs from the sale barn testified that the pigs were "gant" and "uneven" when purchased. The trial court excluded as irrelevant proposed testimony concerning their subsequent weight gain.

Tire tracks were found on Walston's property from a vehicle with a narrow wheel base. Over objection, a police officer was permitted to give a nonexpert opinion that the tire tracks found at the farm were similar in width and tread to tracks made by a vehicle owned by defendants.

Counsel for both defendants, after conferring with their clients, abandoned prior to trial their motion to suppress evidence allegedly seized pursuant to an invalid search warrant. Counsel also stipulated that the value of the eight pigs was $380.

On appeal defendants assert: (1) the trial court should have permitted cross-examination of Walston concerning his prior inconsistent statement as to the

number of pigs missing; (2) the trial court erred in allowing testimony concerning the similarity of tire tracks; (3) the trial court erred in excluding testimony of the growth of the pigs after their sale; (4) the evidence was insufficient to support a finding of guilt; and (5) defendants were denied effective assistance of counsel by counsel's failure to place in issue the element of the value of the stolen property and by counsel's failure to pursue a motion to suppress evidence allegedly illegally seized.

Our review of criminal cases is ordinarily on assigned error. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975). However, we make an independent evaluation of the totality of the circumstances on issues involving the violation of basic constitutional safeguards. Id.

I. Evidence of the Progress of the Pigs. The trial court excluded as irrelevant the proposed testimony of Peggy Kline, who purchased the pigs from the sale barn, concerning their condition at the time of trial. Defendants argue that the evidence should have been admitted and we agree with their contention.

Evidence is relevant if it renders the desired inference more probable than it would be without the evidence. If the evidence has no logical tendency to establish any material proposition, then it is irrelevant. State v. Chadwick, 328 N.W.2d 913, 917 (Iowa 1983). The determination of relevancy is a matter for the trial court's discretion. State v. Mark, 286 N.W.2d 396, 411 (Iowa 1979).

The crucial issue in this case was identification of the pigs brought to the sale barn by defendants as the pigs taken from Walston's farm. Walston testified that although there were no ear tags, ear notches, or tatoos, he was able to identify the pigs by their markings and physical condition. He stated that his pigs were "good, healthy, clean pigs," fairly even in size, and that they could be expected to gain weight at a normal rate. Kline testified that she bought ninety pigs at the sale barn on the day in question and that the eight pigs she purchased which had been brought by defendants were "gant" and "uneven." Defense counsel

attempted to have her testify that those pigs did not progress at a normal rate but were far behind the other pigs purchased at the same time in weight gain and development. Defense counsel's offer of proof shows that Kline would have testified that all of her pigs were raised under the same conditions. It also appears that at the time of purchase those eight pigs had the highest average weight of any group bought that day, but subsequently, lagged behind the other pigs in development.

The State argues that the evidence was irrelevant because there was no showing of similarity of conditions between Walston and Kline's hog farming operations. The record shows, however, that defendants were not attempting to compare the progress of the pigs under Kline's care with their expected progress if retained by Walston. Defendants were rather trying to establish that the pigs were not of good quality by showing that their progress was much slower than that of smaller pigs raised under the same conditions.

We hold that this evidence was relevant to the question of identification of the pigs. Since the issue was so important in the case defendants were prejudiced by the exclusion of the evidence. We reverse and remand the case for a new trial.

Since some of the other issues raised by defendants may recur in the second trial, we address those issues below.

II. Prior Inconsistent Statement. Walston testified that at all times he knew that only eight pigs were missing. Defendants attempted to cross-examine him regarding a written statement he made to the police stating that eight or nine pigs were missing. The trial court refused to allow the cross-examination on the ground that it was beyond the scope of the direct examination since the written statement had not been referred to on direct.

The scope of cross-examination lies within the sound discretion of the trial court. State v. Cuevas, 288 N.W.2d 525, 530 (Iowa 1980). Generally, cross-examination is limited to "(1) matters inquired into on direct examination or

(2) matters which pertain to the witness's credibility, bias, ill will, hostility or interest in the case." Id. One method of attacking a witness's credibility is by proving that the witness, on a previous occasion, has made statements inconsistent with his present testimony. State v. Peterson, 219 N.W.2d 665, 671 (Iowa 1974).

We find that the trial court abused its discretion in not allowing the cross-examination. The prior statement was clearly inconsistent with the witness's testimony in court and was damaging to his credibility. It was particularly important in view of defendants' contention that Walston did not know how many pigs were missing until he saw eight pigs at the sale barn which could be his.

An abuse of discretion alone is not sufficient. It must appear that the error was prejudicial to the defendants. State v. Carney, 236 N.W.2d 44, 46 (Iowa 1975). In this case there does not appear to have been any prejudice. Walston's written statement was subsequently admitted into evidence. The investigating officer testified that Walston initially said nine pigs were missing and later changed it to eight after visiting the sale barn. Furthermore, in disallowing the cross-examination, the trial court noted that defendants were free to call Walston as their own witness and examine him regarding the prior statement. Defendants chose not to do so.

III. Opinion Testimony. Defendants argue that Deputy Ritchhart's testimony concerning the similarity of tire tracks found on Walston's land to the tires on defendant's automobile should have been excluded. They claim that comparison of treads is a subject for expert testimony and, furthermore, even if Ritchhart was qualified to testify, there was no proper foundation for his opinion.

In State v. McCarty, 179 N.W.2d 548, 551 (Iowa 1970), the supreme court held that there was no abuse of discretion where the trial court admitted lay opinion testimony on the similarity of tire and boot tracks which the witness had observed. The court noted that it is within the discretion of the trial court to allow such opinion evidence where there is proper factual foundation for a lay

witness to testify. Id. In State v. Wright, 191 N.W.2d 638, 642 (Iowa 1971), the court stated: "It is generally held a nonexpert witness may express an opinion concerning the similarity of objects he has had an opportunity to observe and compare." The court found no evidence in Wright that the witness had actually made the necessary observations and, therefore, concluded the testimony was without proper foundation.

In this case Ritchhart testified that on the day of the crime he personally observed the tire tracks at the scene and noticed the distance between the tires and the tread. He also testified that he had personally observed defendant's automobile and noticed the same features. Based on these observations, there was sufficient foundation for his testimony. The fact that Richhart had not made measurements of both the tracks and the automobile goes more to the weight to be given his testimony than its admissibility.

IV. Sufficiency of the Evidence. In reviewing a claim that the evidence was insufficient to support the verdict, this court reviews all the evidence in the light most favorable to the State. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). If there is substantial support in the record, the jury verdict is conclusive. Id. at 338.

Although there was conflicting evidence, the following facts are supported by the record. Walston discovered on the morning of October 7, 1982, that there were eight or nine pigs missing from his farm. He did not see a place where they could have gotten out of the pen, but he did notice tracks on the property made by a vehicle with a narrow wheel base. The tracks appeared to be similar to those made by defendant's Toyota. There was fresh hog manure in defendants' Toyota on October 7. Walston saw eight pigs at the Montezuma Sale Barn which he "positively thought" were his pigs. Although there were no ear notches, ear tags, or tatoos, Walston identified the pigs by their size and markings. Defendants had brought the eight pigs to the sale barn and defendant Mulligan represented to the

sale barn employees that she was bringing the pigs in on behalf of Mrs. D. L. Clay, an elderly woman from New Sharon. Mulligan cashed checks from the sale barn made out to Mrs. D. L. Clay stating that she was divorced and the sale barn still used her married name.

From this evidence the jury could conclude that defendants drove their Toyota to Walston's farm and took the pigs to the Montezuma Sale Barn to be sold under the name of Mrs. D. L. Clay with the intent to obtain the proceeds of the sale themselves.

V. Effective Assistance of Counsel. We need not address this issue in view of our holding in part I of this opinion that defendants are entitled to a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.