IN THE COURT OF APPEALS OF IOWA

No. 6-254 / 95-1070

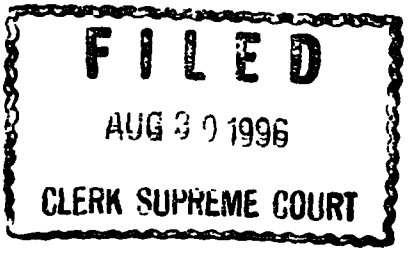
STATE OF IOWA,

Plaintiff-Appellee,

vs.

DARRELL L. WESSELS,

Defendant-Appellant.



Appeal from the Iowa District Court for Mitchell County, John S. Mackey and Jon Stuart Scoles, Judges.

Defendant appeals from his conviction of first-degree theft. **AFFIRMED.**

Judith O'Donohoe of Eggert, Erb, O'Donohoe, Frye & Von Ah, Charles City, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Douglas R. Marek, Deputy Attorney General, Jerry H. Folkers, County Attorney, and Mark L. Walk, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Habhab and Huitink, JJ.

HABHAB, J.

Defendant Darrell Wessels appeals from his conviction of first-degree theft. He raises several arguments which include: 1) there was insufficient evidence to support the conviction; 2) testimony should not have been allowed about the value of a stolen transmitter and an attempt to retrieve it; 3) the trial court erred in failing to give ten jury instructions defendant requested; 4) the court erred in failing to grant defendant's request for a new trial; and 5) the trial court abused its discretion in sentencing defendant to the maximum penalty. We affirm.

Defendant's feeder pig business was under investigation by the Iowa Division of Criminal Investigation (DCI). An employee of the business, Dennis Gabel, was cooperating with the DCI and met with defendant wearing a body transmitter. At some point during the meeting defendant frisked Gabel and discovered the transmitter. Gabel testified defendant tried to rip the microphone off of Gabel's chest and grabbed a pair of wire cutters and was going to cut the wires. Gabel told defendant, "I'll take it off. Just calm down, Darrell."

Gabel took off some of his clothing so he could remove the transmitter. When it fell to the floor, he and defendant both reached for it and defendant grabbed it. Defendant would not return it despite Gabel's request to do so. Defendant told Gabel to leave. Defendant placed the transmitter in a cornfield near his property and unsuccessfully attempted to call his attorney. Approximately fifteen minutes later a

DCI agent who had been monitoring the recorded conversation went to defendant's home and attempted to retrieve the transmitter. When defendant would not provide it to the agent, he was arrested for theft.

Defendant was charged with first-degree theft for committing the theft of property from a person and second-degree theft for committing the theft of property having a value in excess of $1000. The jury returned a guilty verdict on both counts. The verdicts were merged for sentencing and a conviction and judgment was entered only on the offense of first-degree theft.

I. Sufficiency of the Evidence. Defendant argues the State erred in submitting the charge of theft to the jury due to the insufficiency of the evidence to prove a taking without consent, a taking from the person of Dennis Gabel, an intent to permanently deprive the owner of the property, and the value of the property. Given the jury's verdicts on counts I and II were merged and defendant was convicted only of first-degree theft, we need not address his sufficiency of the evidence claims which pertain to the charge of second-degree theft.

When reviewing criminal convictions for sufficiency of the evidence, we review the evidence in a light most favorable to the State. *State v. McGrew*, 515 N.W.2d 36, 37 (Iowa 1994). A conviction is reversed only if there is no substantial evidence in the record supporting the verdict or the verdict is clearly against the weight of the evidence. *Id.* at 37-38.

Substantial evidence is evidence which could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* at 38. A fair inference of guilt with respect to each element of the crime charged is sufficient to uphold a verdict. *Id.* We consider all of the evidence, not merely that supportive of the conviction, in determining the sufficiency of the evidence to support a guilty verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

A review of the record reveals there was substantial evidence to support the conviction. Defendant had made incriminating statements during his recorded conversation with Gabel. Gabel testified defendant tried to rip the microphone off of him and grabbed wire cutters in an attempt to cut the wires. Once Gabel had removed the transmitter, defendant grabbed it and would not return it even though asked to do so. When asked by a DCI agent to return it, defendant again refused to do so.

Defendant offered contradictory testimony indicating Gabel was embarrassed to have been discovered wearing the wire and voluntarily gave it to defendant. Defendant also claims he did not intend to permanently keep it but planned on turning over the transmitter to his attorney. The jury is free to believe or disbelieve any part or all of a witness's testimony. *See State v. Frake*, 450 N.W.2d 817, 819 (Iowa 1990).

There was sufficient evidence to convince a rational trier of fact defendant took possession or control of the transmitter from the person of Gabel and did so with the intent to deprive him of the property.

II. Testimony of Agent Day. Defendant raises two arguments with respect to the testimony of Agent Day. He first argues the agent should not have been allowed to testify as to the value of a new transmitter. He contends the agent lacked the qualifications to express an opinion on the value of the transmitter. The value of the transmitter was not an issue with respect to the charge of theft from a person. *See State v. Thornton*, 506 N.W.2d 777, 780 (Iowa 1993) (any theft from the person of another is first-degree theft regardless of value). Since the issue of the value of the transmitter is relevant only to the charge of second-degree theft and the jury's verdict on that charge was merged with the first-degree charge, we need not address the merits of Agent Day's qualifications to express an opinion on the value of the transmitter, but if we had to, we would conclude that he was qualified.

Defendant also argues it was beyond the minutes of testimony for the court to allow Agent Day to testify about the attempt to retrieve the transmitter from defendant. The State is required to file minutes of testimony for each witness expected to testify at trial. Iowa R. Crim. P. 5(3). The minutes must be filed with the trial information and supply a full and fair statement of the anticipated testimony. *State v. Wells*, 522 N.W.2d 304, 307 (Iowa App. 1994). The obligation to provide a full and fair statement does not require the State to use precision in composing the expected testimony of each witness named in the minutes. *Id.* The "full and fair" statement standard mandates the prosecutor adequately alert the defendant to the

source and nature of the testimony, and place defendant on notice of the need for further investigation of the particular details of the witness's expected testimony. *Id.*

The minutes alerted defendant that Agent Day was a technical specialist with the DCI and was expected to testify about the value of the transmitter and his monitoring of the conversation between Gabel and defendant on September 13, 1994. The general subject of the minutes was the transmitter and it was within the nature of this testimony for Day to testify how he fitted Gabel with the transmitter as well as the DCI's efforts to retrieve the transmitter after defendant had discovered its existence. *See State v. Caldwell*, 404 N.W.2d 186, 188 (Iowa App. 1987) (testimony not specifically identified in minutes not precluded if within general subject of testimony identified in the minutes). We find it was well within the trial court's discretion to allow this testimony.

III. Jury Instructions. Defendant claims the trial court should have submitted the ten jury instructions he requested. "The trial court's decision on instructions will not be disturbed absent an abuse of the trial court's discretion." *State v. Cunningham*, 463 N.W.2d 887, 889 (Iowa App. 1990). We will not find an abuse of discretion unless such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.* The burden of proving an abuse of discretion lies with a defendant. *Id.*

Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. *Id.* A trial court's instructions must

all be read together. *State v. Sauls*, 356 N.W.2d 516, 520 (Iowa 1984). A trial court does not err in refusing to submit a requested instruction where the substance of the instruction was adequately incorporated in, or duplicative of, the instructions which were given to the jury. *State v. Spargo*, 364 N.W.2d 203, 210 (Iowa 1985); *State v. Hatter*, 342 N.W.2d 851, 857-58 (Iowa 1983).

Defendant's requested instructions one, five, and nine pertain to whether the jury had any reasonable doubt as to whether the transmitter was taken without Gabel's consent and whether the jury had to find each element of the offense beyond a reasonable doubt. Instructions four, nine, and seventeen adequately advised the jury of the concept of "reasonable doubt" and that the State was required to prove each element beyond a reasonable doubt Instructions fifteen, seventeen, and twenty adequately explained the elements of first-degree theft and the intent to deprive another of property by removing it from a person. The content of defendant's requested instructions one, five, and nine was already adequately addressed by the instructions the court gave and it was not an abuse of the court's discretion to refuse to give them.

In requested instruction two, defendant sought to have the jury instructed an "intent to deprive" must exist when a person is initially deprived of property. Instruction twenty adequately apprised the jury an "intent to deprive" means to permanently withhold or to withhold for such time or under such circumstances as to cause the property to lose its value. In his requested instruction number three,

defendant wanted the jury to be instructed to consider whether the dispossession of property was temporary in nature. Instruction twenty adequately advised the jury to consider whether the deprivation of property was temporary or permanent in nature. Defendant's requested instruction number four regarding permanent deprivation of property was also sufficiently encompassed by instruction twenty.

Defendant's requested instruction number six seeks to have specific factors listed which the jury can consider in finding a specific intent to permanently deprive. Instructions twenty and twenty-one adequately instruct the jury on these matters. In requested instruction seven, defendant sought to have the jury instructed market value is the preferred value if it can be determined. This issue is moot given that defendant was convicted of first-degree theft and, in any case, the issue of value was adequately encompassed within instruction nineteen.

In requested instruction ten, defendant wanted the jury instructed that property he obtained by consent could not be deemed to have been taken from the owner or possessor. Instructions seventeen and twenty adequately address this concern. In requested instruction eleven, defendant wanted the jury to be instructed it was necessary the property be taken by stealth or violent force. The law does not support giving this instruction and it was properly denied.

We find the substance of defendant's requested instructions one through seven, nine, and ten was adequately encompassed by the instructions given by the court.

Requested instruction eleven was not otherwise consistent with the applicable law. There was no abuse of discretion in the trial court's refusal to give the instructions.

IV. Motion for New Trial. Defendant had filed a motion for a new trial which was denied. His motion asserted three grounds for a new trial: 1) the verdict was contrary to the law and/or the evidence; 2) the trial court had refused to properly instruct the jury; and 3) defendant did not receive a fair and impartial trial. In his brief, defendant concedes his arguments with respect to the first two of these grounds are the same as those raised in separate arguments in his brief. Our analysis in sections I and III adequately dispose of those two issues and they need not be readdressed here.

Defendant's third ground for seeking a new trial is that he was denied a fair and impartial trial. We are not convinced error was preserved with respect to the many arguments defendant raises concerning this third ground. Nonetheless, we will address it on appeal. *See Ort v. Klinger*, 496 N.W.2d 265, 267 (Iowa App. 1992) Defendant claims he did not receive a fair trial because: 1) attorney O'Donohoe was not appointed as his court-appointed counsel; 2) the court refused to exclude the testimony of Agent Day regarding the value of the transmitter; 3) the court allowed Day to testify beyond the minutes of testimony; 4) the court refused to grant a judgment of acquittal at the close of the State's evidence; 5) the court refused to grant a judgment of acquittal at the close of all of the evidence; 6) the court refused to give defendant's requested jury instructions; 7) the court refused to grant a new trial; 8)

the court refused to grant defendant's request for court-appointed appellate counsel; 9) defendant's ten-year sentence was excessive and out of proportion to the offense; and 10) defendant's sentencing should not have been delayed.

Motions for a new trial are governed by Iowa Rule of Criminal Procedure 23(2). The grant or denial of a new trial is committed to the sound discretion of the trial court. *State v. Belt*, 505 N.W.2d 182, 184 (Iowa 1993). With respect to defendant's new trial claims involving Agent Day's testimony, the sufficiency of the evidence to support submission of the charges to the jury, and the refusal to submit defendant's jury instructions, those matters were raised by defendant as separate appellate arguments and are adequately addressed in sections I, II, and III of this opinion. Defendant's remaining claims relating to the appointment of counsel and his sentencing have no bearing on the claim he did not receive a fair and impartial trial. Defendant raised no valid claims for a new trial, and we find no abuse of discretion in the denial of his motion.

V. Sentencing. Pending defendant's sentencing on the theft claim, defendant pled guilty to an unrelated perjury charge concerning false statements made in an application to the Iowa Department of Agriculture. Sentencing on both the theft and perjury convictions occurred at the June 20, 1995, hearing.

At the sentencing hearing, defendant asked the court to consider a suspended sentence. The court instead imposed concurrent terms of incarceration, a term not to exceed ten years on the theft conviction and a term not to exceed five years on the

perjury conviction. Defendant appeals the sentences imposed for both of the convictions.

A trial court has considerable discretion in sentencing. *State v. LeGrand*, 501 N.W.2d 59, 64 (Iowa App. 1993). "There is a strong presumption in favor of a sentence given by a trial court that is rebutted only by an affirmative showing of an abuse of discretion." *Id.* The burden of showing an abuse of discretion is on the defendant. *Id.*

We have carefully reviewed defendant's arguments and the transcript of the sentencing hearing and find no abuse of discretion. Defendant has a criminal history which the court was justified in taking into consideration at the sentencing hearing. As previously noted, we do not find that it was an abuse of discretion to sentence defendant to imprisonment.

AFFIRMED.

Huitink, J., concurs; Sackett, C.J., dissents.

SACKETT, C.J. (dissenting)

I dissent.

An employee of defendant was wearing a body transmitter on defendant's premises attempting to record a conversation the employee was having with defendant. Defendant was not told the conversation was being recorded. When he learned it was, he got angry and tried to rip the transmitter off the employee's chest and grabbed it when it fell to the floor. He put it in a cornfield and tried to call his attorney. Before he could talk to his attorney, a DCI agent asked for the transmitter. He did not give it to the agent. Defendant was charged and convicted of theft of the transmitter. I do not find this to be substantial evidence of theft. The item was brought onto defendant's property by a person other than the one who asked for its return. There is no evidence defendant intended to keep the property beyond that time necessary to consult with his attorney. I would dismiss the conviction.

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