IN THE COURT OF APPEALS OF IOWA

No. 3-302 / 92-1045

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000923

STATE OF IOWA,

Appellee,

vs.

LEON KURTIS SHIVERS,

Appellant.

Appeal from the Iowa District Court for Webster County, Louie Beisser, Judge, and Kurt Wilke, Judicial Magistrate.

The defendant appeals his convictions and sentences for criminal trespass and theft in the first degree. **AFFIRMED.**

Kevin A. Fors of Parker & Fors, Fort Dodge, for appellant.

Bonnie J. Campbell, Attorney General, Chris Odell, Assistant Attorney General, James J. Koll, County Attorney, and Cynthia Voorde, Assistant County Attorney, for appellee.

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

SCHLEGEL, J. 000924

The defendant, Leon Kurtis Shivers, appeals his convictions and sentences for criminal trespass and first-degree theft. He contends the trial court erred in: (1) admitting an exhibit over his objection that the exhibit was not properly authenticated; (2) admitting his confession over his objection that it was coerced; (3) denying his motions for directed verdict and judgment of acquittal on the ground the State failed to corroborate his out-of-court confession; and (4) considering improper matters during sentencing. The State claims the defendant failed to preserve error on the issue of the coerced confession.

On December 19, 1991, the State charged Leon Kurtis Shivers with arson in the first degree, burglary in the first degree, and theft in the first degree. The matter proceeded to a jury trial. At trial, Tim Strauss, a security guard, testified he saw Shivers in the vicinity of a men's clothing store on the night it was broken into and set afire. Strauss saw Shivers and two other men carrying a box in an alley near the store.

As a result of the fire, the clothing store sustained extensive damage, and approximately $9000 in merchandise was taken from the store. The State sought to introduce an envelope the owner of the clothing store found sometime after the burglary and fire. He claimed the envelope had blood on it that was not present prior to the fire. The

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blood from the envelope matched Shivers's blood type. Shivers objected to the introduction of the envelope, claiming a break in the chain of custody had occurred. Shivers claimed the police clerk who received the envelope from the store owner could not unequivocally identify the envelope. The court overruled the objection.

Detective Chris McCarville testified that Shivers admitted to being present in the area of the clothing store on the night in question. Shivers talked with McCarville on two occasions. The first occasion ended when Shivers told McCarville he wanted to confer with his attorney before speaking with McCarville. Shivers made the "confessions" on the second occasion.

Shivers's counsel objected to the admission of Shivers's out-of-court statements on the ground that a family member had been used to coerce the statements from Shivers. Shivers contended his brother was working as a confidential informant and was a factor in Shivers's decision to speak with McCarville. Also, Shivers argued the second contact should not have occurred without an attorney present. The district court overruled the objections.

The court also overruled Shivers's motion for directed verdict and judgment of acquittal. The jury found Shivers guilty of criminal trespass and first-degree theft. In addition, the jury returned a special interrogatory stating the theft involved over $5,000. The court entered judgment

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on the jury's verdict and sentenced Shivers to a period not to exceed ten years on the theft conviction and thirty days on the criminal trespass conviction. The court ordered the sentences to run concurrently. Shivers appeals.

During sentencing, the district court noted the extensive damage caused by the fire and the fact that approximately $18,000 of the damage remained unreimbursed. On appeal, Shivers contends that because he was acquitted of arson, such a reference amounted to an improper sentencing consideration.

Shivers first contends the district court erred in admitting a blood-stained envelope (State's exhibit thirty-six) over his objection that the exhibit was not properly authenticated. "Admission of evidence over a chain-of-custody objection is a matter within trial court's discretion, and reversal is warranted only upon a clear showing that discretion was abused." State v. Gibb, 303 N.W.2d 673, 681 (Iowa 1981).

> The test for admissibility of physical evidence in the face of a chain-of-custody objection is that it be "reasonably probable tampering, substitution or alteration did not occur." [Citation omitted.] The proof necessary to satisfy this rule differs from case to case, depending on the type of evidence under consideration. We require a strict showing in dealing with drugs, blood, and other substances which are subject to deterioration or change without detection.

State v. Moses, 320 N.W.2d 581, 585 (Iowa 1982).

> The trial court may be aided in this determination by presuming State agents would not tamper with the evidence. [Citations omitted.] When trial court has determined that the identification of the exhibit is sufficient, contrary speculation

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> affects the weight of the evidence but not its admissibility. [Citations omitted.]

Gibb, 303 N.W.2d at 681.

Here, Shivers claims that Joyce Peterson's--the police clerk who received the envelope from the clothing store owner--testimony is fatal to the chain of custody because she did not unequivocally identify the envelope at trial. However, the record reflects that Ms. Peterson testified she received a bloodstained envelope from Richard Whiting (the clothing store owner) on December 12, 1991, and kept it in her exclusive custody before giving it to Detective Lisa Campbell later the same day. The following questions were posed and answers given during the direct examination of Ms. Peterson:

> Q: Were you working on December 12th, 1991? A: Yes.
> Q: On that date, did you have occasion to receive any evidence that was related to the Eddie Quinn's case? A: Yes.
> Q: Okay. Can you describe the circumstances that you received this evidence? A: The gentleman that owns Eddie Quinn's came in with an envelope with blood on it and told me he found it on his desk and wanted to turn in as evidence.
> Q: And did you take that from him? A: Yes, I did.
> Q: What did you do with it? A: I waited for a detective to come in and handed it to them.
> Q: Okay. And who did you give it to? A: Lisa Campbell.
> Q: During the time that you had it in your custody and control, where was it kept? A: At my desk.
> Q: Did anyone tamper with it while it was there? A: No.
> Q: Okay. Did you alter or tamper with it in any manner? A: No.
> Q: Do you believe that you would recognize the envelope? A: Well, possibly.
> Q: Okay. Let me hand you State's Exhibit No. 36. Do you recognize that? A: I can't state for sure.

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Q: And after you gave it to Detective Lisa Campbell, did you have any more involvement with that envelope? A: No, I didn't.

In addition to this testimony, the record reveals the envelope's location and condition are strictly accounted for from the moment the store owner handed it to Ms. Peterson at the Fort Dodge Police Department on December 12, 1991, until production of the envelope at defendant's trial on April 21, 1992. The State produced each link in the chain as a witness at trial, see State v. Lunsford, 204 N.W.2d 613, 617 (Iowa 1973), and continuous custody was established through the witnesses' testimony.

This evidence, which discloses the circumstances surrounding the custody of State's exhibit thirty-six, reveals the unlikelihood of intermeddlers tampering with it. We conclude the State has successfully made a strict showing that it is "reasonably probable tampering, substitution or alteration did not occur" and, by doing so, has adequately accounted for the continuous custody of the exhibit. Gibb, 303 N.W.2d at 681. The contrary efforts by the defendant to rebut the presumption that State agents would not tamper with the evidence have been unsuccessful. The defendant's speculation regarding the insufficiency of the authentication of State's exhibit thirty-six goes to the weight to be afforded the exhibit, not to its admissibility. Id. The district court did not abuse its discretion by admitting the exhibit.

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Secondly, Shivers contends the district court erred in admitting certain testimony of Officer McCarville concerning statements made by Shivers. Shivers argues the statements were elicited as a result of psychological coercion, therefore constituting a violation of Shivers's Fifth-Amendment rights. We find this contention to be without merit. Since Shivers asserts a violation of constitutional safeguards, our scope of review with regard to this issue is de novo based on the totality of the circumstances. State v. Newsom, 414 N.W.2d 354, 357 (Iowa 1987).

An accused's due process rights are violated when the State uses a confession obtained by either physical or mental coercion. State v. Ware, 205 N.W.2d 700, 703 (Iowa 1973). "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." Colorado v. Connelly, 479 U.S. 157, 167, 107 S. Ct. 515, ____, 93 L. Ed. 2d 473, 484 (1986).

> Many factors bear on the issue of voluntariness. These include the defendant's knowledge and waiver of his Miranda rights, [citation omitted]; the defendant's age, experience, prior record, level of education and intelligence, [citation omitted]; the length of time defendant is detained and interrogated, [citation omitted]; whether physical punishment was used, including the deprivation of food or sleep, [citation omitted]; defendant's ability to understand the questions, [citation omitted]; the defendant's physical and emotional condition and his reaction to the interrogation, [citation omitted]; whether any deceit or improper promises were used in gaining the admissions,

> [citation omitted]; any mental weakness the defendant may possess, [citations omitted].
>
> The question of voluntariness is a matter of sorting out the impetus for the inculpatory statement. To be admissible the statement must freely emanate from the mind of the speaker. If the statement is not the product of "rational intellect and free will," but results from a promise of help or leniency by a person in authority it is not considered voluntary and is not admissible. [Citations omitted.]

State v. Hodges, 326 N.W.2d 345, 348 (Iowa 1982).

Following the incident at Eddie Quinn's clothing store, the defendant discussed his involvement in the incident with his brother, Ronnie. Later the same night Ronnie contacted Officer McCarville at the defendant's request, and the officer traveled to the defendant's mother's home in Fort Dodge to discuss the crime. At that time, the defendant refused to speak with Officer McCarville before consulting an attorney. The officer ceased all questioning and left the residence.

Several days later, on December 9, 1991, the defendant met with Officer McCarville again at the Hydro Electric Park in Fort Dodge. The meeting arrangements were organized by Ronnie at the defendant's request. Prior to this meeting, the defendant had discussed with his mother--at length--the advisability of explaining his involvement in the crime to Officer McCarville. After determining that he "didn't have nothing to hide," the defendant voluntarily drove himself to the park, met with Officer McCarville, signed a written waiver of Miranda

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rights, and made the statements which were introduced at trial over the defendant's objections. Ronnie was not present at either of the two meetings between the officer and the defendant.

Furthermore, the record is devoid of any evidence indicating that Officer McCarville engaged in deception, uttered threats, promised leniency, or engaged in any other improper activity to induce the defendant's statements. In addition, no evidence exists indicating Ronnie acted pursuant to the officer's direction in eliciting statements from the defendant. To the contrary, it was the defendant who requested Ronnie's assistance in contacting the officer. At the time the defendant met with the officer at the park, the defendant had neither been charged with any offense related to the clothing store incident, nor had he been placed under arrest. The defendant was clearly not in custody and was free to leave.

This evidence reveals the defendant knowingly and intelligently waived his Miranda rights; he was not coerced into doing so or into making the statements that followed. As a result, the statements were admissible as "the product of 'rational intellect and free will.'" Hodges, 326 N.W.2d at 349. The defendant's contention to the contrary is without merit.

Next, Shivers argues the district court erred in denying his motions for a directed verdict and judgment of acquittal based upon a lack of evidence in the record to

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corroborate the defendant's "confession" as required by Iowa Rule of Criminal Procedure 20(4). This rule prohibits the conviction of an accused based solely upon an out-of-court confession. Having reviewed the record in this case, we question whether the defendant's statements can in fact be construed as a confession, thereby bringing the statements within the purview of the rule.

> A confession is an acknowledgment in express terms, by a party in a criminal case, of his guilt of the crime charged. An admission is a statement by the accused, direct or implied, of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove his guilt. An admission is something less than a confession and but an acknowledgment of some fact or circumstance which in itself is insufficient to authorize a conviction, and which tends only to establish the ultimate fact of guilt. [Citations omitted.]

State v. Olson, 149 N.W.2d 132, 136 (Iowa 1967).

> A confession is an admission or acknowledgment of guilt of the very offense charged. It may be made by the statement of the accused when confronted with the charge or when speaking of the alleged crime, saying in substance or effect, "I am guilty," or "I acknowledge the truth of the charge," or as some authorities hold by his admission of the essential facts constituting such crime. But an admission of the truth of facts not in themselves sufficient to constitute the alleged offense is not a confession of guilt, although it may be admissible as evidence in support of the charge.

Id. at 137 (quoting State v. Cook, 188 Iowa 655, 660-61, 176 N.W. 674, 676-77 (1920).

Here, the defendant gave a statement to Officer McCarville that "minimize[d] his involvement in the case." The defendant denied any participation in the arson and burglary at the clothing store, and he specifically denied

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taking, receiving, or distributing any of the stolen clothing. Although he admitted carrying two boxes across the alley from Eddie Quinn's to Warden Plaza, the defendant told Officer McCarville that "he didn't really know what was going on." This evidence indicates the defendant's statements were mere admissions which fall outside the scope of rule 20(4).

However, even assuming--without deciding--that the defendant's statements amounted to a confession, we conclude sufficient evidence exists in the record to successfully meet the corroboration requirement of the rule and to warrant the conviction.

> Rule 20(4) requires corroboration which connects defendant with the crime. Because this rule is similar to the rule for corroboration of accomplice testimony, we apply the principle that the existence of corroborative evidence is an issue for the court and that its sufficiency is ordinarily for the jury. [Citation omitted.] Corroboration need not be strong nor need it go to the whole of the case so long as it confirms some material fact connecting the defendant with the crime.

State v. White, 319 N.W.2d 213, 214 (Iowa 1982).

The testimony of Tim Strauss, the security guard at Warden Plaza, corroborates the defendant's statement that defendant was in the alley outside Eddie Quinn's on December 3, 1991, at two o'clock in the morning carrying boxes of clothing with Tyrone Shivers and Jerry White. This testimony constitutes sufficient corroborative evidence.

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Finally, the defendant contends the district court abused its discretion by relying on improper matters when sentencing him. Imposition of sentences is within the trial court's discretionary power and will be set aside only for an abuse of discretion. State v. Black, 324 N.W.2d 313, 315 (1982).

> The decisions of the trial court are cloaked with a strong presumption in their favor, and until the contrary appears, the presumption is that the discretion of the trial court was rightfully exercised. [Citation omitted.] To overcome this presumption of regularity requires an affirmative showing of abuse, and the burden of so showing rests upon the party complaining. . . . "[T]his burden is heavy, indeed, for it can only be sustained by showing abuse and prejudice." [Citation omitted.]

State v. Stanley, 344 N.W.2d 564, 568 (Iowa App. 1983).

Shivers argues the sentencing court erred by allegedly considering the economic impact on the victim as a result of the arson, a charge for which defendant was acquitted. We find the defendant has failed to demonstrate abuse or prejudice. The court's judgment entry, dated June 10, 1992, reveals the court relied upon defendant's extensive criminal record, his previous failure to complete his probation in "three to four" instances and on the probation/parole officer's recommendation of incarceration in the presentence investigation. The defendant has failed to show that any reliance by the sentencing court on the victim's economic loss prejudiced the defendant.

Accordingly, for all the reasons discussed above, we affirm the defendant's convictions and resulting sentences.

AFFIRMED.