

IN THE COURT OF APPEALS OF IOWA

No. 1-614 / 91-279

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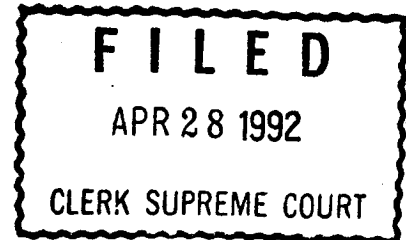
STATE OF IOWA,

Appellee,

vs.

RODNEY CLEDUS COWANS,

Appellant.



Appeal from the Iowa District Court for Polk County,
Glenn E. Pille, Judge.

Defendant appeals conviction for theft in the second degree by knowingly exercising control over stolen property exceeding \$500 in value. **REVERSED AND REMANDED.**

Robert P. Montgomery of Parrish, Kruidenier & Exline,
Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Bruce Kempkes,
Assistant Attorney General, John Sarcone, Polk County
Attorney, and James Ward, Assistant County Attorney, for
appellee.

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

DONIELSON, P.J.

In the early morning hours of January 20, 1990, a burglary took place at T. & R. Used Cars, located at 2901 East University in Des Moines. Among the items stolen from the business were an automobile, a microwave oven, and a large toolbox containing several tools. A list of the missing tools was prepared by Jim Robbins, the owner of the business, and the list was given to the police.

On January 25, 1990, police detectives conducted a consent search of defendant Rodney Cowans' home. Cowans acknowledged he had recently purchased a microwave oven from Ambrose Coleman, who had previously been arrested in connection with the stolen automobile. The officers examined the microwave and could see the serial number had been removed. They noticed a sticky substance remained where the adhesive serial number had been. The officers also observed a red Sears Craftsman Toolbox matching the description of the one stolen. Cowans indicated the toolbox was his.

The next day officers returned to the Cowans' home accompanied by Robbins. Robbins identified the toolbox as being one of the items stolen from his business. The officers then seized the toolbox from the Cowans' home but failed to make an inventory of its contents. Again, without making an inventory of the tools, the police released them to Robbins. Robbins took the evidence back

to his business, and sometime later, he inventoried the tools. Between the time the toolbox and its contents were released to him and the time of trial, Robbins and his employees regularly used both the toolbox and the tools. In fact, Robbins even welded areas of the toolbox, painted it, and scratched off areas of paint. Months later the toolbox and its contents were returned to the county attorney's office.

Cowans was charged with second-degree theft in violation of Iowa Code sections 714.1(4) and 714.2(2). The trial information charged Cowans had committed theft in the second degree by exercising control over stolen property exceeding \$500 in value, knowing the property to be stolen or having reasonable cause to believe the property was stolen.

Cowans filed a pretrial motion in limine seeking to prevent the State's introduction of certain physical evidence at trial. The motion asserted the State would be unable to establish the foundation necessary for introduction of the tools into evidence. Cowans argued the State would be incapable of establishing the identity of the tools or that the tools had not been altered, substituted or otherwise tampered with. Ruling on the motion was deferred.

When the State sought to introduce the contents of the toolbox into evidence at trial, Cowans again objected on the same grounds. A voir dire examination of Robbins was

conducted, and the trial court overruled the motion stating if Robbins could identify the tools in the courtroom then the tools would be admissible.

Robbins was able to identify the tools introduced into evidence as those he had inventoried sometime after they had been released to him by the police. However, no witnesses could identify the tools at trial as those which had been seized from Cowans' home. The testimony at trial established the combined value of the toolbox and tools at approximately \$500. The trial court admitted the toolbox and its contents into evidence over Cowans' objection.

Cowans maintained he had innocently acquired the stolen microwave from Coleman and the toolbox could not have been the one taken in the burglary. Cowans was convicted, and as a habitual offender, he was sentenced to imprisonment for a period not to exceed fifteen years with a mandatory minimum confinement of three years.

Cowans appeals, asserting several arguments for reversal. Because we reverse on his first assignment of error, we need not address the others. Again on appeal, Cowans challenges the State's chain of custody showing regarding the contents of the toolbox. Our review on this issue is for an abuse of the trial court's discretion. State v. Smith, 272 N.W.2d 859, 862-63 (Iowa 1978).

To be admissible, evidence must be properly identified. State v. Orozco, 290 N.W.2d 6, 10 (Iowa 1980). Accordingly, to introduce physical evidence at

trial, the State must make a prima facie showing of its identity and its connection to the crime. State v. Collier, 372 N.W.2d 303, 308 (Iowa App. 1985). Part of the necessary identification involves establishing the reasonable probability the evidence has not been tampered with, altered or substituted. State v. Hall, 297 N.W.2d 80, 87 (Iowa), cert. denied, 450 U.S. 927 (1980); Orozco, 290 N.W.2d at 10. The trial court must determine whether the identification of physical evidence is sufficient in light of the article's nature, the circumstances surrounding its custody, and the likelihood an intermeddler has tampered with it. State v. Mayes, 286 N.W.2d 387, 391 (Iowa 1979).

In explaining this foundational analysis, the Iowa Supreme Court has stated:

[W]hen real evidence is offered an adequate foundation for admission will require testimony first that the object offered is the object which was involved in the incident, and further that the condition of the object is substantially unchanged. If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition. On the other hand, if the offered evidence is of such a nature as not to be readily identifiable, or to be susceptible to alteration by tampering or contamination, sound exercise of the trial court's discretion may require a substantially more elaborate foundation. A foundation of the latter sort will commonly entail testimonially tracing the 'chain of custody' of the item with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with.

State v. Lunsford, 204 N.W.2d 613, 616 (Iowa 1973) (quoting C. McCormick, Evidence § 52 at 115-17 (2d ed. 1972)).

In the instant case, we believe a strict chain of custody showing--detailing the custody of the evidence between the time it was seized and the time it was introduced at trial--should have been required because the physical evidence was peculiarly subject to tampering, alteration and substitution. See State v. Moses, 320 N.W.2d 581, 585 (Iowa 1982).

The challenged evidence consists of a number of tools kept in a toolbox. When the toolbox and its contents were seized from Cowans' home, they were released to the owner, Jim Robbins, who continued to use the tools and make the tools available for use by his employees in a repair garage for seven months. Robbins testified the tools had been used by many people and he had not always been present to supervise their use. We are persuaded the nature of the challenged evidence and the circumstances under which the evidence was kept between the time it was seized and the time it was introduced at trial make it quite probable the evidence was tampered with, substituted, added to or subtracted from.

It is simply in the nature of a set of tools made accessible to a number of people that the original set will change over a period of time. Some tools will inevitably not be returned, and indeed new tools will probably

errantly find their way into the set. Indeed, Robbins testified to this phenomenon during his voir dire examination. He stated as many as one-third of the tools he had turned over to the county attorney had not been in the toolbox when it was stolen. Additionally, he stated many tools had been lost and not replaced. It is also quite possible some had been replaced.

Under these circumstances, we do not believe an adequate identification was made of the contents of the toolbox. Although a list of the missing tools had been given to the police sometime after the theft, no inventory was made of the tools when they were seized from Cowans' home. Neither was an inventory made when the tools were released to Robbins. Robbins was unable to identify the tools as those which were seized from Cowans' home or as those which were released to him. Instead, Robbins was only able to identify the tools at trial as those which he inventoried sometime after they were released to him. Therefore, no witness was able to identify the tools introduced at trial as those which had been seized from Cowans' home. This shortcoming amounts to a gap in the chain of custody.

The gap consists of both the time in which the police had custody of the tools--the time between seizure of the tools and their release to Robbins, and the time in which Robbins had custody of the tools before he inventoried them. Of course, in reaching its decision, the trial court

may presume State agents or officials did not tamper with evidence in their custody. State v. Lamp, 322 N.W.2d 48, 59 (Iowa 1982). However, the court may not make such a presumption with regard to the time the tools were in Robbins' custody. As such, the period of time in which the tools were in Robbins' custody before he inventoried them constitutes the fatal gap in the State's chain of custody showing.

Failure on the part of the State to negate any reasonable probability the evidence has been substituted, tampered with, or altered is fatal to its attempt to introduce the evidence at trial. See State v. Bakker, 262 N.W.2d 538, 542 (Iowa 1978). The erroneous admission of evidence is presumed to have prejudiced the defendant unless the contrary is affirmatively shown. State v. Branch, 222 N.W.2d 423, 427 (Iowa 1974).

On this record, we find the trial court abused its discretion in admitting the contents of the toolbox as evidence. The tools certainly accounted for some portion of the value attributed to the stolen property. The amount of that portion of the value is unknown. Had the tools not been admitted into evidence, the total value of the stolen property would certainly have been lower and may have been under \$500. Because the offense for which Cowans was convicted criminalized theft of property exceeding \$500 in value, we are convinced Cowans was prejudiced by the erroneous admission of the tools into evidence.

The costs of this appeal are taxed to the State.

For all the reasons stated, the judgment of the district court is reversed and the case is remanded for new trial.

REVERSED AND REMANDED.