



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
PAUL KELLY,)
Defendant-Appellant.)

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STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
KENNETH TAFT,)
Defendant-Appellant.)

9-203
88-639

Appeal from the Iowa District Court for Dubuque County
(No. 5731-87CA), Lawrence H. Fautsch, Judge.

Defendants appeal their conviction of criminal mischief
in the fourth degree. **REVERSED AND REMANDED.**

William L. Wegman, State Public Defender, and
Raymond E. Rogers, Assistant Public Defender, for
defendant-appellants.

Thomas J. Miller, Attorney General; Richard J. Bennett,
Assistant Attorney General; and Michael Whalen, Assistant
County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ.

PER CURIAM

Defendants were accused of damaging an apartment rented by one of them, following a dispute with the building's owner over the return of a security deposit. Following a joint bench trial, they were convicted of criminal mischief in the fourth degree in violation of Iowa Code section 716.1 and 716.6 (1987). Both defendants appeal and their appeals have been consolidated. We reverse.

When defendant Kenneth Taft was ready to move out of an apartment, he had a dispute with the building's owner about the return of a \$180 security deposit. When Taft moved out, on the day before his month-to-month tenancy was to expire, Taft and his friend Paul Kelly allegedly nailed shut the doors and windows of the apartment. The owner of the apartment later spent about \$135 to repair the damage caused by this act.

Taft and Kelly were charged with criminal mischief in the fourth degree. After a joint bench trial, they were convicted of that crime. Both have appealed, and the appeals have been consolidated.

The defendants contend the acts charged did not amount to criminal mischief, where one of them was entitled to possession of the apartment and where the amount of damages was less than the amount of the security deposit held by the owner. They also challenge the admission of alleged hearsay evidence. Finally, they contend the district court

erred by ordering them to pay restitution for the damage where the amount of damage is fully covered by the security deposit.

Our scope of review is for errors at law. Iowa R. App. P. 4.

I. Taft and Kelly first challenge the admission of certain alleged hearsay evidence. The challenged testimony was given by their neighbors who testified Kelly's fifteen-year-old son told them Taft and Kelly had been the ones who boarded up the apartment. The State argues any possible error which resulted from the admission of the hearsay evidence was harmless.

The hearsay testimony at issue here occurred after Shane Kelly, a fifteen-year-old son of defendant Paul Kelly, testified he did not tell neighbors his dad had nailed shut the duplex. He also testified he is in eighth grade special education class and he has "some problems from time to time remembering things." The State then called the neighbors (husband and wife), who testified over defendants' hearsay objections Shane Kelly had told them Paul Kelly and Kenneth Taft had nailed the duplex shut. The trial court apparently admitted the evidence under the catch-all exception to the hearsay rule found in Iowa Rules of Evidence 803(24). Our courts have found evidence under this exception requires five specific findings by the trial judge (trustworthiness, materiality, necessity, notice, and

service of the interests of justice). State v. Brown, 341 N.W.2d 10, 14 (Iowa 1983). The trial court here made no such findings. We also note the catch-all exception is only to be used in extraordinary situations not to effectively circumvent the hearsay rule on a regular basis. Id. at 14-15.

We determine the testimony was clearly hearsay and the trial court erred in overruling defendants' objection. We now turn to the State's contention regardless of whether or not the trial court erred, the evidence was merely cumulative and therefore not prejudicial to the defendants.

Erroneous admission of hearsay evidence is presumed to be prejudicial unless the contrary is affirmatively shown. State v. Reitenbaugh, 392 N.W.2d 46, 49 (Iowa 1986). We determine the State has not met its burden.

The trial court specifically relied on the hearsay evidence in its findings, stating [the neighbors] "both testified that defendant Kelly's son, Shane Kelly, previously stated to them defendant Taft and defendant Kelly were, in fact, the perpetrators." Without this evidence to corroborate the landlord's assertions of a telephone call from the defendants to him claiming they had done the damage, the evidence put forth by the State is in no means overwhelming. Therefore, we hold defendants should be given a new trial, this time excluding the unreliable hearsay evidence. Because we reverse on this

issue, we do not find it necessary to address defendants' other assignments of error.

REVERSED AND REMANDED.