FILED
AUG 30 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed August 30, 1983
vs.	)	
DAVID CARL THOMPSON,	)	3-175 / 68930
Defendant-Appellant.	)	

Appeal from Black Hawk District Court - C. W. Antes, Judge.

Defendant appeals from his conviction of burglary in the second degree in violation of Iowa Code §§ 713.1 and 713.3 (1981). AFFIRMED.

Francis Hoyt, Appellate Defender, and Fern S. Shupeck, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Teresa Baustian, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel and Hayden, JJ.

PER CURIAM

Defendant, David Thompson, appeals from his conviction of burglary in the second degree in violation of Iowa Code §§ 713.1 and 713.3 (1981). We affirm.

In the early morning of March 22, 1982, Thompson was captured leaving a building which housed a closed bar. The police had been alerted by a silent alarm. Thompson apparently was carrying a box which was later found to contain cigarettes and other items allegedly stolen from the bar. Defendant was taken to the Waterloo police station where he was questioned by officers. He was willing to give an oral statement to the officers, claiming that he was drunk when he broke into the building and was merely trying to get a drink after hours, but refused to sign a written statement to that effect. He read and orally stated that he understood the waiver of his Miranda rights. Defendant moved to suppress the statements given the officers. At the hearing defendant stated that when he talked to the officers he had thought only written statements could be used against him. The motion to suppress was denied.

At trial, defendant was prevented from impeaching two police officer witnesses with allegedly inconsistent statements given at a prior hearing, because defendant did not have a transcript of the hearing with which to conduct the impeachment. Objections were sustained before the defendant could complete the impeachment, but it appears that he intended to ask the officers if they had testified to the contrary at the deposition. There is dispute over the exact terms, but an agreement was reached that at least one of the officers would be made available for further testimony the next day, when defendant would have obtained an overnight copy of the deposition testimony. The next day neither officer was present or available. The court ruled that an agreement had been reached that one of the officers would testify, and as to that officer allowed defendant to read two lines of a deposition testimony into the record. The two lines allegedly were contrary to the officer's "live" testimony the previous day. The court did not

recall an agreement that the State would produce the second officer, and did not allow defendant any relief for his inability to impeach that officer.

After the jury had deliberated for a time it sent the court a note asking the "[d] ifference between intent for second degree and criminal trespass?" The court responded: "The definition of 'intent' in Instruction No. 21 is the only definition of intent given in these instructions." Instruction twenty-one was a diminished responsibility instruction which did not really define specific intent, although specific intent was defined, as "intent," in instruction ten. The jury returned a verdict of guilty of burglary in the second degree.

On appeal, defendant asserts: (1) that his giving oral statements to police officers who were interviewing him did not constitute a waiver of his Miranda rights because he did not understand that oral statements could be used against him; (2) that certain evidence should not have been admitted into evidence over his chain of custody objections; (3) that the trial court's failure to require the State to comply with an agreement to produce a police officer for cross-examination the last day of trial violated his sixth amendment right of confrontation; and (4) that the trial court should have further explained "intent" in response to a note from the jurors during deliberations.

Generally, our review of criminal proceedings is at law for correction of errors, and not de novo. Iowa R. App. P. 4. However, on issues concerning violation of constitutional safeguards, our review is **de novo.** State v. Lamp, 322 N.W.2d 48, 50 (Iowa 1982).

I. Suppression of Confession. The defendant, following his arrest outside the Fortune's Tap lounge, gave two oral statements to the police while in custody. The defendant voluntarily gave the oral statements to the police, but refused to reduce to writing what he had admitted verbally. At the suppression hearing the defendant contended that he did not knowingly and intelligently waive his right against self-incrimination because he had understood that only written statements could be used against him. We find this claim to be without merit.

A waiver of Miranda rights "must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." Edwards v. Arizona, 451 U.S. 477, 482, 101 S. Ct. 1880, 1884, 68 L. Ed. 2d 378, 385 (1981) (waiver must not only be voluntary, but must also be intelligently and knowingly made); State v. Lamp, 322 N.W.2d 48, 54 (an express written or oral waiver is not required). "The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." North Carolina v. Butler, 441 U.S. 369, 373, 99 S. Ct. 1755, 1757, 60 L. Ed. 2d 286, 292 (1979). The State must meet its heavy burden to prove by a preponderance of the evidence that defendant understood his rights and waived them knowingly, intelligently, and voluntarily. State v. Davis, 304 N.W.2d 432, 435 (Iowa 1981).

The defendant had a previous felony arrest and conviction and was familiar with the police investigatory process. He was also aware of the consequences of giving an oral statement. Although the record of the hearing and the trial record did not disclose the defendant's education, the presentence report established that he had completed the seventh grade and had obtained a general equivalent high school degree. Both officers read to the defendant his Miranda rights, which make no distinction between written and oral statements, before interrogation and inquired as to his understanding. Moreover, during the suppression hearing, defendant initially stated that he "didn't know the difference between written and oral [statements]." It was only after further questioning that defendant asserted he had believed an oral statement could not be used to incriminate him in court. Upon our **de novo** review of the facts and circumstances surrounding this case and viewing the actions and words of the defendant, we find he understood his right

against self-incrimination and knowingly, intelligently and voluntarily waived that right before making inculpatory statements to the police. See Tague v. Louisiana, 444 U.S. 469, 471, 100 S. Ct. 652,653, 62 L. Ed. 2d 622, 625 (1980).

II. Chain-of-Custody. The defendant asserts that the trial court erroneously admitted into evidence State's exhibits F and G over his chain of custody objections. Exhibit F was a box containing liquor and cigarettes which defendant allegedly was carrying from the Fortune's Tap lounge. Exhibit G was a pair of gloves the defendant allegedly was wearing the night of his arrest. At trial the arresting officers, Meyer and Pillack, identified the exhibits and testified that they were in substantially the same condition as when they were seized from the defendant. They also testified that each of the exhibits had been turned into the police "evidence room" on the evening of the arrest along with an identification tag. They were unable to personally testify to the chain of custody during the period after the exhibits were placed in evidence lockers until trial. They were permitted, however, to testify to the chain of custody using the evidence tags. Apparently this testimony was permitted under the business records exception to the hearsay rule. Defendant contends the showing failed to negate any reasonable probability of tampering, substitution or alteration of the evidence and the trial court therefore abused its discretion in admitting these exhibits.

As a foundational prerequisite to the admissibility of physical evidence, the prosecution is required to show a sufficient custody to establish the article has not been altered between the time it was obtained and the time it is introduced at trial. State v. Langlet, 283 N.W.2d 330, 336 (Iowa 1979). The showing that is required is that it is reasonably probable that tampering, substitution, or alteration did not occur. State v. Gibb, 303 N.W.2d 673, 681 (Iowa 1981). The sufficiency of the showing is dependent on the susceptibility of the article to alteration or substitution. State v. Lamp, 322 N.W.2d at 57. Whether the prosecution has established a proper chain of custody is a matter committed to

the sound discretion of the trial court; reversal is warranted only when there has been a clear abuse of discretion. State v. Gibb, 303 N.W.2d at 681. Furthermore, the court may presume that State agents would not tamper with the evidence. State v. Branch, 222 N.W.2d 423, 426 (Iowa 1974).

Since gloves, bottles of liquor, and packages of cigarettes are generally not susceptible to alteration, a less elaborate foundation is required for admission. (The contents of the bottles and packages were not at issue.) See State v. Lamp, 322 N.W.2d at 59 (clothing not susceptible to alteration); State v. Gibb, 303 N.W.2d at 681 (drugs subject to alteration); State v. Bakker, 262 N.W.2d 538, 543 (Iowa 1978) (physical evidence with unusual characteristics such as money, a gun, clothing, matches or glasses requires a less elaborate foundation). Without determining whether the witness's use of the evidence tags to testify as to the complete chain of custody for exhibits F and G was proper, we conclude that the absence of direct evidence for the entire chain of custody does not establish an abuse of discretion on the part of the trial court in admitting these exhibits. See State v. Lamp, 322 N.W.2d at 59 (lack of evidence as to the chain of custody of clothing does not establish abuse of discretion in admitting the evidence). See also State v. Peck, 329 N.W.2d 680, 686 (Iowa Ct. App. 1982). Here the evidence disclosed the circumstances surrounding the custody of the exhibits and the unlikelihood of intermeddlers tampering with exhibits F and G. Continuous custody need not be shown as a foundation for admissibility of solid objects which are not easily susceptible to undetected alteration. State v. Pierce, 287 N.W.2d 570, 574 (Iowa 1980); State v. Ash, 244 N.W.2d 812, 816 (Iowa 1976), cert. denied, 430 U.S. 918 (1977).

III. Cross-Examination of Officers Pillack and Meyer. The defendant asserts that the trial court's failure to require the State to produce Pillack and Meyer the last day of trial for cross-examination denied the defendant his constitutional right of confrontation. We make an independent evaluation of the

totality of the relevant circumstances disclosed by the entire record and thus review the evidence **de novo** to determine whether there has been a constitutional violation. State v. Dean, 332 N.W.2d 336, 338 (Iowa 1983).

The defendant attempted to impeach both officers at trial with statements they had made at a prior suppression hearing. After objections were sustained for each witness, the parties and the court engaged in side bar discussions during which the parties allegedly agreed the witnesses would be produced the next day after a transcript of the suppression hearing was obtained. The defense rested subject only to the recall of those two witnesses for additional cross-examination. The next day the State failed to produce either witness. The trial court ruled that an agreement had existed to produce Officer Meyer and allowed the defendant to read in those impeaching portions of his testimony.

Upon our **de novo** review, we determine whether there was an agreement for the State to produce those witnesses for additional cross-examination and, if so, whether the failure to do so resulted in a denial of constitutional rights. First, since any agreement reached was made in an off-record side bar conference it is difficult to determine on appeal what exactly was agreed upon. However, reviewing the record of the trial, the record of a subsequent in-chambers discussion and the record of the post-trial motions made by the parties, we find that there was in fact an agreement by the State to produce Officer Meyer for purposes of impeachment.

The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." United States Const. amend. VI. The primary interest thus secured is the right of cross-examination. State v. Froning, 328 N.W.2d 333, 336 (Iowa 1982). See State v. Ege, 274 N.W.2d 350, 356 (Iowa 1979) (this includes effective cross-examination). A secondary purpose of the confrontation clause is to enable the judge and jury to obtain the elusive and incommunicable evidence of a witness's

deportment while testifying. State v. Strable, 313 N.W.2d 497, 500 (Iowa 1981). This secondary purpose is satisfied if the witness, throughout the material part of his testimony, is before the tribunal where his demeanor can be adequately observed. Id., 313 N.W.2d at 501 (emphasis in original).

Officer Meyer had testified on cross-examination that the defendant took the box containing the items removed from Fortune's Tap back into the building when he discovered the police outside. The officer testified at the suppression hearing the defendant set the box down and ran back inside. Because there was no transcript of the suppression hearing available to impeach the witness, (see State v. Gilmore, 259 N.W.2d 846 (Iowa 1977) (procedure to impeach with prior inconsistent statement)), the parties agreed to continue cross-examination for impeachment purposes the next day. When the State failed to have the witness present, the court permitted the defendant to read the inconsistent statements into the record. The defendant contends this denied the jury the opportunity to observe Officer Meyer's demeanor whie being questioned with respect to his inconsistent statements.

Assuming, without deciding, that the trial court should have required the State to produce Officer Meyer, there was no constitutional violation in this case. Both purposes of the confrontation clause, cross-examination and observations of the demeanor of the witness by the trier of fact, were served in this case. The witness was, in fact, subjected to substantial cross-examination before the jury and was questioned as to his prior inconsistent statement (although this questioning was precluded by objection). The jury was able to adequately observe the witness's demeanor and the impeachment was completed by reading into the record the witness's prior statement. Any error was harmless beyond a reasonable doubt. State v. Strable, 313 N.W.2d at 501; but see Chipman v. Mercer, 628 F.2d 528, 533 (9th Cir. 1980) (confrontation clause doctrine appears to require reversal if there is any error).

IV. Instructions. The defendant contends the trial court erred in not further instructing the jury, in response to the jury's inquiries, the difference between intent for second degree burglary and intent for criminal trespass. There was no evidence in this case that the break-in was for purposes other than theft. Although the legal test for the giving of a lesser included offense instruction for criminal trespass was satisfied (the indictment charged both breaking and/or entering), the factual test was not. State v. Harlow, 325 N.W.2d 90, 91 (Iowa 1982); State v. Wales, 325 N.W.2d 87 (Iowa 1982).

Under the "all or nothing" rule, defendant was either guilty of the crime of burglary or nothing at all. See State v. Morgan, 322 N.W.2d 68 (Iowa 1982) (discussion of "all or nothing" rule). The intent instructions given by the court were proper for the offense of burglary in the second degree. See State v. Sangster, 299 N.W.2d 661, 664 (Iowa 1980) (the burglary offense requires an intent to commit a particular kind of public offense).

The trial court's refusal to further instruct the jury as to the different intent requirements under the trespass and burglary statutes resulted in no prejudice to the defendant. Furthermore, Iowa Rule of Civil Procedure 18(5)(g) leaves it "in the discretion of the trial court" whether additional instructions will be given. State v. Dvorsky, 322 N.W.2d 62, 66 (Iowa 1982). We find no abuse of discretion by the trial court in refusing to expand on its definition of "intent."

AFFIRMED.