

SUPREME COURT OF NEBRASKA

State of Nebraska v. Dale Gartner

263 Neb. 153 (Neb. 2002) · No. S-00-1215 · Decided February 8, 2002

SUMMARY

The Supreme Court of Nebraska reviews Dale Gartner’s convictions for theft of county property, focusing primarily on whether the State presented sufficient evidence of the property’s market value at the time of the thefts. The court addresses jury instructions, verdict forms, prosecutorial misconduct, and the appropriate disposition when evidence supports theft but does not establish the felony-level value threshold. The excerpt concludes that the evidence was sufficient for several counts but insufficient to support the fax machine conviction as a Class IV felony.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Gerrard; Hendry; Wright; Stephan; McCormack; Miller-Lerman
JURISDICTION	Nebraska
DECIDED	February 8, 2002
DOCKET	S-00-1215
DISPOSITION	affirmed_in_part_and_remanded_in_part
PROCEDURAL POSTURE	Appeal from district court conviction for theft
STANDARD OF REVIEW	For sufficiency of evidence, the court reviews whether, after viewing evidence in the light most favorable to prosecution, any rational trier of fact could find essential elements beyond a reasonable doubt. For jury instructions, correctness is a question of law. For prosecutorial misconduct/mistrial, abuse of discretion.
PRECEDENTIAL VALUE	binding
PARTIES	Dale Gartner v. State of Nebraska

TOPICS

- sentencing
- evidence
- statutory interpretation
- jury instructions

PRACTICE AREAS

- criminal law
- criminal procedure
- evidence
- statutory interpretation

QUESTIONS PRESENTED

1. Whether the district court erred in overruling motion for directed verdict at close of State's case
2. Whether the district court erred in giving jury instruction No. 6 and rejecting Gartner's proposed instruction
3. Whether the district court erred in giving verdict forms that limited jury's discretion as to dates of alleged thefts
4. Whether the district court erred in denying motion for mistrial based on prosecutorial misconduct
5. Whether the evidence was sufficient to sustain the convictions, particularly regarding value of stolen property at time of theft

HOLDINGS

1. A defendant who moves for directed verdict at close of State's case, and when the motion is overruled proceeds with trial and introduces evidence, waives the appellate right to challenge the overruling of the motion, but may still challenge sufficiency of the evidence.
2. The district court erred in giving jury instruction No. 6 which implied guilt could be determined before value, but the error was not prejudicial because the jury was clearly instructed that value must be proved beyond a reasonable doubt and the record shows the jury found value proved for each conviction.
3. The district court did not err in providing verdict forms that specified dates for determining value of stolen items because the forms were consistent with jury instructions that required the State to prove thefts occurred on dates alleged in the information.
4. The district court did not abuse its discretion in overruling motion for mistrial based on prosecutor's improper statement about uncharged items because the prompt admonition to the jury was sufficient to dispel potential prejudice.
5. For Counts III and VI (file cabinet and fax modem), evidence of purchase price at time of theft was sufficient. For Count V (inkjet printer), expert testimony of \$25-\$50 value was sufficient. For Count II (digital camera), purchase price of \$799 less than a month before theft with evidence camera was unused was sufficient evidence of fair market value. For Count VII (fax machine), evidence of \$525 purchase price nearly 7 months before theft with insufficient evidence of condition was insufficient to support felony conviction but sufficient to prove some intrinsic value.
6. Section 28-518(8) requires proof that stolen item has at least some intrinsic value as an element of the offense, but proof of specific value at time of theft is necessary only for gradation of the offense above Class II misdemeanor.

KEY QUOTATIONS

“While it is true that ... it is necessary for the State to establish the market value of the stolen property as of the date of the commission of the offense,... we do not interpret this rule in such a narrow fashion as to require testimony of a witness or witnesses in haec verba that, at the specific time of the taking of the stolen property, it had a market value of a specific amount. These facts may be established circumstantially, as well as by

direct evidence, and the ultimate resolution of the value of the property at the time and place of the taking is clearly a fact question for the decision of the jury from the evidence adduced.” (p. 859)

“The plain language of § 28-518(8) requires that the State must prove, as an element of a theft offense, that the item stolen has at least some intrinsic value. The statute does not require that proof of a specific value must be presented in order for the conviction to be sustained, although the State must prove the specific value of the stolen property at the time of the theft beyond a reasonable doubt in order to obtain a conviction for any offense greater than a Class II misdemeanor.” (p. 862)

FACTUAL BACKGROUND

Dale Gartner, former Adams County assessor, was charged with theft after several items of county property were found in his possession after he left office. The items included a digital camera purchased new for \$799 less than a month before the alleged theft date, a file cabinet purchased for \$154.95 on the alleged theft date, an inkjet printer purchased for \$400 but estimated at \$25-\$50 at the time of alleged theft, a fax modem purchased for \$140 on the alleged theft date, and a fax machine purchased for \$525 nearly 7 months before the alleged theft date.

PROCEDURAL HISTORY

Dale Gartner was charged with seven counts of theft. Count I was dismissed; Count IV resulted in acquittal. The jury convicted Gartner on Counts II, III, V, VI, and VII. Gartner appealed, challenging directed verdict, jury instructions, verdict forms, prosecutorial misconduct, and sufficiency of evidence.

DISPOSITION

affirmed_in_part_and_remanded_in_part

REMAND INSTRUCTIONS

Vacate sentence on Count VII and remand for imposition of appropriate sentence for Class II misdemeanor theft of property with value less than \$200

CASES CITED

- State v. Ildefonso, 262 Neb. 672, 634 N.W.2d 252 (2001)
- State v. Redmond, 262 Neb. 411, 631 N.W.2d 501 (2001)
- State v. Taylor, 262 Neb. 639, 634 N.W.2d 744 (2001)
- State v. Johnson, 250 Neb. 933, 554 N.W.2d 126 (1996)
- State v. Isham, 261 Neb. 690, 625 N.W.2d 511 (2001)
- State v. McLemore, 261 Neb. 452, 623 N.W.2d 315 (2001)
- State v. Severin, 250 Neb. 841, 553 N.W.2d 452 (1996)
- State v. Mohr, 10 Neb. App. 442, 632 N.W.2d 382 (2001)
- In re Interest of Shea B., 3 Neb. App. 750, 532 N.W.2d 52 (1995)
- State v. Culver, 233 Neb. 228, 444 N.W.2d 662 (1989)

- State v. Johnson, 261 Neb. 1001, 627 N.W.2d 753 (2001)
- State v. Jackson, 258 Neb. 24, 601 N.W.2d 741 (1999)
- State v. Garza, 241 Neb. 256, 487 N.W.2d 551 (1992)
- State v. Weik, 206 Neb. 217, 292 N.W.2d 289 (1980)
- Coley v. State, 302 Ark. 526, 790 S.W.2d 899 (1990)
- People v. White, 167 A.D.2d 256, 561 N.Y.S.2d 756 (1990)
- People v. Langston, 96 Ill. App. 3d 48, 420 N.E.2d 1090, 51 Ill. Dec. 532 (1981)
- People v. Paris, 182 Colo. 148, 511 P.2d 893 (1973)
- State v. Lyman, 966 P.2d 278 (Utah App. 1998)
- State v. Ybarra, 9 Neb. App. 230, 609 N.W.2d 696 (2000)