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STATE OF NEBRASKA, APPELLEE, V. RAAD S. ALMASAUDI, APPELLANT.

802 N.W.2d 110

Filed September 2, 2011. No. S-10-816.

1. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
2. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
3. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 and 27-404(2) (Reissue 2008), and the trial court's decision will not be reversed absent an abuse of discretion.
4. **Convictions: Theft: Proof.** In order for a defendant to be convicted of receiving stolen property, it must be found that the accused received, retained, or disposed of stolen property knowing or believing that it was stolen.
5. **Intent: Circumstantial Evidence.** Knowledge, like intent, may be inferred from the circumstances surrounding the act.
6. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
7. **Jury Instructions: Convictions: Appeal and Error.** Before an error in the giving of jury instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant.
8. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court would have been sufficient to sustain a guilty verdict.
9. **Theft: Value of Goods: Proof.** The statutory language of Neb. Rev. Stat. § 28-518(8) (Reissue 2008) requires only that some value be proved as an element of a theft offense, not that a particular threshold value be proved as an element of the offense.
10. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner.
11. ____: ____. Evidence of other bad acts which is relevant for any purpose other than to show the actor's propensity is admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008).
12. **Evidence: Words and Phrases.** Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means that its relevance does not depend upon its tendency to show propensity.
13. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court's analysis under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008),

considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded for a new trial.

Bernard J. Glaser, Jr., for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

HEAVICAN, C.J., GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

I. NATURE OF CASE

Raad S. Almasaudi was charged with theft by receiving stolen property after various items of stolen property were found in his residence. A jury convicted Almasaudi of three counts of felony theft by receiving stolen property. Almasaudi appeals. For the following reasons, we reverse, and remand for a new trial.

II. BACKGROUND

Almasaudi was charged with three counts of theft by receiving stolen property pursuant to Neb. Rev. Stat. § 28-517 (Reissue 2008). Count I alleged that an item of stolen property was valued in excess of $1,500, a Class III felony; count II alleged that an item of stolen property was valued at $500 or more but not over $1,500, a Class IV felony; and count III alleged that an item of stolen property was valued in excess of $1,500, a Class III felony.[1] The property was allegedly stolen by Anthony Vandry and later purchased by Almasaudi. A jury convicted Almasaudi on all counts.

[1] See Neb. Rev. Stat. § 28-518(1) and (2) (Reissue 2008).

1. Motion in Limine

Almasaudi filed a pretrial motion in limine seeking to exclude, among other things, "any theft allegation or offense, or any other offense, including any convictions thereof, that may be alleged to have occurred at any time or date other than the date charged in the information," pursuant to Neb. Evid. R. 403 and 404, Neb. Rev. Stat. §§ 27-403 and 27-404 (Reissue 2008). Almasaudi also filed a "Motion to Disclose Rule 404(2) Evidence and to Determine Admissibility" under rule 404(2) and Neb. Evid. R. 103(3) and 104, Neb. Rev. Stat. §§ 27-103(3) and 27-104 (Reissue 2008). Thereafter, Almasaudi filed a supplemental motion seeking to exclude the admission of portions of videotaped interviews between law enforcement and Almasaudi and specific lines of the transcribed interviews.

At a hearing on the motions, the court received transcripts of the interviews between law enforcement and Almasaudi. Almasaudi sought to exclude statements made by Almasaudi and questions asked by law enforcement relating to items not charged in the information—specifically any reference to Almasaudi's purchasing gas at reduced prices from Vandry and Almasaudi's receipt of allegedly stolen property from Vandry that was not named in the information. The State argued that such evidence did not fall under rule 404, because it would be offered to show Almasaudi's knowledge that the charged items were stolen.

The court overruled Almasaudi's motion in limine. Regarding rule 404(2), the court stated: "This provision appears to be inapplicable here. It is not other wrongs or acts of [Almasaudi] that are involved, but the acts of a third person from whom [Almasaudi] allegedly obtained property. Such evidence is admissible to show knowledge or absence of mistake or accident." The court also stated that although the motion was overruled, it would provide a limiting instruction at trial. Prior to trial, Almasaudi received a continuing objection to the matters overruled in his motion in limine.

2. Evidence Adduced at Trial

Sgt. Michael Bassett of the Lincoln Police Department set up a sting operation to catch persons involved in a series

of thefts from vehicles at trailheads and parks in southwest Lincoln. Bassett observed Vandry and another person enter the "bait vehicle" and take various items. Vandry and the other person were arrested. During an interview following his arrest, Vandry informed law enforcement that stolen property could be found at Almasaudi's residence.

Bassett went to the residence where Almasaudi lived alone. Almasaudi consented to a search of his residence, and then participated in the search by explaining which items he had purchased from Vandry. Law enforcement seized, among other things, a garden tiller, a television and receiver, and a "four-wheeler" from the residence. Almasaudi admitted to purchasing all the items from Vandry, though he initially told police that he had purchased the television with his residence.

Almasaudi is originally from Iraq. He emigrated from Saudi Arabia to the United States in 1997. At that time, Almasaudi could not speak English, and presently, he cannot read English. Almasaudi's girlfriend testified that he communicates "[f]airly well" in English. Almasaudi testified that he had met Vandry in late January or early February 2009, 3 to 4 months before the property was seized from Almasaudi's residence.

Almasaudi testified that Vandry had told him Vandry had debts and needed money and that Almasaudi purchased various items from him. Almasaudi purchased the four-wheeler from Vandry for $2,000, the television set and receiver for $1,200, and the tiller for $150. Almasaudi testified that he bought these items from Vandry, along with a lawnmower, a snowblower, nail guns, an in-dash DVD player, and a bicycle, but that he did not know they were stolen. In total, Almasaudi spent approximately $4,000 purchasing these items from Vandry.

The tiller had been reported stolen by Kay Roberts. She purchased the tiller in the mid-1990's for around $1,800 to $2,000. Roberts testified that she recognized the tiller seized from Almasaudi's residence as the one taken from her home. She stated that the tiller was in good working condition when stolen, that it appeared to have remained in that condition, and that she would guess that the tiller was currently worth between $600 and $800.

The television and receiver had been reported stolen by Lindsey Emery. She recognized the items seized from Almasaudi's residence as those taken from her home. Emery testified that she had purchased the television and receiver in 2006 for approximately $2,400. She testified that she would have asked for $1,200 for the items were she to attempt to sell them.

The four-wheeler had been reported stolen by Michael Hicks. He testified that he recognized the four-wheeler as his own and that he had purchased it in 2007 for $5,000. Hicks testified that the four-wheeler was now damaged and that it would cost $700 to fix it. He also stated that he would try to sell the four-wheeler for $2,000 without fixing any damage.

The State offered into evidence DVD's of interviews between Almasaudi and Bassett, Officer David Moody, and Det. Timothy Kennett. The DVD's were the subject of Almasaudi's previously submitted motion in limine, but Almasaudi did not object when the DVD's were offered as exhibits at trial or when they were played for the jury. In the interviews, Almasaudi stated that Vandry would come to his residence with a Visa credit card and fill up Almasaudi's car with gas for $20. Almasaudi purchased gas in this manner six to eight times.

Regarding the stolen items seized, Almasaudi stated that initially, he believed the four-wheeler was stolen, but that Vandry presented him with a paper that he believed to be a bill of sale. Almasaudi told Kennett that everything he bought from Vandry was cheap, and when asked what he thought about that, he said, "I mean, it's stolen, I'm sure."

At the close of evidence, Almasaudi moved for a mistrial on the basis that the "404(2) evidence was improperly presented to the jury." The court overruled Almasaudi's motion, and stated that it did not think the evidence objected to in Almasaudi's motion in limine was "404 evidence" and that such evidence was relevant to show knowledge. However, the court did issue an oral limiting instruction. It stated:

> Members of the jury, you have heard statements by . . . Almasaudi during the interviews by police officers involving incidents that do not involve the specific charges in

> this case such as the use of credit cards by . . . Vandry and others and the purchase of other property by . . . Almasaudi from . . . Vandry. This evidence should be considered by you solely, if at all, to show . . . Almasaudi's knowledge or absence of mistake involving the property which is the subject of the charges in this case.

The jury was given a written limiting instruction which read: "During this trial I called your attention to certain evidence that was received for specified limited purposes; you must consider that evidence only for those limited purposes and for no other."

At the close of the State's evidence and at the close of trial, Almasaudi moved for a directed verdict. Almasaudi argued that the State had failed to establish Almasaudi's knowledge that the charged items were stolen, and had also failed to prove the value of those items. The court overruled both motions.

At the jury instruction conference, the State and Almasaudi offered different proposed instructions on the definition of "knowingly" as it is used in regard to § 28-517. The court accepted the State's proposed instruction over Almasaudi's objection and submitted the instruction as jury instruction No. 7. It read in part: "'Knowingly' is defined as having actual knowledge that an item is stolen or that the surrounding facts would lead a reasonable prudent person to believe an item is stolen." The jury returned a unanimous guilty verdict on all three counts. It specifically found that the property in count I had a value of $2,700, the property in count II had a value of $1,000, and the property in count III had a value of $600. The district court sentenced Almasaudi to 2 years of probation on each count to be served consecutively, and on each of the counts, Almasaudi was ordered to serve 160 days in county jail, with credit for time served of 69 days on count II. Almasaudi timely appeals.

III. ASSIGNMENTS OF ERROR

Almasaudi assigns, restated, that (1) the district court erred in admitting evidence of prior bad acts; (2) the district court erred in wrongly instructing the jury on the definition of

"knowingly"; (3) the evidence was insufficient to support a conviction of receiving stolen property having a value of $500 or more, count II in the information, because the State's evidence of value was speculative; (4) the evidence was insufficient to support a guilty verdict on all counts; and (5) the district court erred in refusing to direct a verdict in favor of Almasaudi.

IV. STANDARD OF REVIEW

[1] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[2]

[2,3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.[3] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.[4] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rules 403 and 404(2), and the trial court's decision will not be reversed absent an abuse of discretion.[5]

V. ANALYSIS

1. Jury Instruction No. 7: Definition of "Knowingly"

Almasaudi argues that the term "knowing" in § 28-517 dictates a subjective standard and that the court's instruction defining "knowingly" was erroneous because it led the jury to apply an objective standard in this case. Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[6]

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[2] *State v. Miller*, 281 Neb. 343, 798 N.W.2d 827 (2011).

[3] *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010).

[4] *Id.*

[5] *Id.*

[6] *State v. Miller, supra* note 2.

[4] Section 28-517 of the Nebraska Criminal Code is based on the Model Penal Code § 223.6, 10A U.L.A. 561 (2001), and provides: "A person commits theft if he receives, retains, or disposes of stolen movable property of another knowing that it has been stolen, or believing that it has been stolen, unless the property is received, retained, or disposed with intention to restore it to the owner." In order for a defendant to be convicted of receiving stolen property, it must be found that the accused received, retained, or disposed of stolen property knowing or believing that it was stolen.[7] The central focus of the crime, therefore, is on *the accused's* knowledge or belief.[8] This focus imposes a subjective standard on the knowledge requirement of § 28-517.

[5] Knowledge, like intent, may be inferred from the circumstances surrounding the act.[9] For example, possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which the fact finder may reasonably draw the inference, but is not required to do so, and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.[10] The jury must still satisfy itself beyond a reasonable doubt that the defendant actually had the requisite knowledge or belief.[11]

The Model Penal Code and Commentaries § 223.6[12] states:

> Recent codes and proposals are sharply divided among three basic approaches to the question of required culpability for criminal receiving. About a third continue the requirement that the receiver "know" that the property

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[7] See § 28-517.

[8] *State v. LaFreniere*, 240 Neb. 258, 481 N.W.2d 412 (1992), *overruled on other grounds, State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995).

[9] *Id.*

[10] See *State v. Parks*, 245 Neb. 205, 511 N.W.2d 774 (1994).

[11] See, *id.*; A.L.I., Model Penal Code and Commentaries § 223.6, comment 4(d) (1980).

[12] *Id.*, comment 4(a) at 238-39.

> in question is stolen property.[13] A slight plurality agree with the Model Code judgment that knowledge or belief "that it has probably been stolen" is the appropriate standard.[14] The remainder adopt the position taken by some older statutes[15] and penalize receiving with "reasonable grounds for believing the property stolen," thereby imposing liability for negligence.[16]

As noted by the Model Penal Code and Commentaries, Nebraska's criminal receiving statute, § 28-517, falls in the "slight plurality" mentioned above. Statutes falling in the plurality dictate a knowledge requirement similar to the element in § 28-517. They provide that a person is guilty of theft by receiving if the person intentionally receives stolen property "knowing that it has probably been stolen or believing that it

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[13] See, Cal. Penal Code § 496 (West 2010); Haw. Rev. Stat. § 708-830(7) (1993 & Cum. Supp. 2010); Ind. Code Ann. § 35-43-4-2(b) (LexisNexis 2009); Ky. Rev. Stat. Ann. § 514.110(1) (LexisNexis 2008 & Cum. Supp. 2011); Mont. Code Ann. § 45-6-301(3) (2007); N.Y. Penal Law §§ 165.40 to 165.54 (McKinney 2010); Tex. Penal Code Ann. § 31.03(b)(2) (West 2011); Va. Code Ann. § 18.2-108 (2004 & Cum. Supp. 2008); Wash. Rev. Code Ann. §§ 9A.56.140 to 9A.56.170 (2009).

[14] See, Ala. Code § 13A-8-16 (2006); Conn. Gen. Stat. Ann. § 53a-119(8) (West 2007); Del. Code. Ann. tit. 11, § 851 (2007 & Cum. Supp. 2010); Me. Rev. Stat. Ann. tit. 17-A, § 359(1) (1983 & Cum. Supp. 2004); Mass. Gen. Laws. Ann. ch. 266, § 60 (West 2008); Minn. Stat. Ann. § 609.53 (West 2009); Mo. Ann. Stat. § 570.080 (West 1999 & Cum. Supp. 2011); Neb. Rev. Stat. § 28-517; N.H. Rev. Stat. Ann. § 637:7(I) (2007); N.J. Stat. Ann. § 2C:20-7 (West 2005); N.M. Stat. Ann. § 30-16-11(A) (2004 & Cum. Supp. 2008); Okla. Stat. Ann. tit. 21, § 1713 (West 2002); 18 Pa. Cons. Stat. Ann. § 3925(a) (West 1983); S.D. Codified Laws § 22-30A-7 (2006); Utah Code Ann. § 76-6-408(1) (LexisNexis 2008 & Supp. 2011); W. Va. Code Ann. § 61-3-18 (LexisNexis 2005).

[15] See, e.g., Ala. Code § 13-3-55 (LexisNexis 1977) (repealed 1978); La. Rev. Stat. Ann. § 14:69 (1974); 18 Pa. Stat. Ann. § 4817 (West 1963) (repealed 1973).

[16] See, Ariz. Rev. Stat. Ann. § 13-1802(A)(5) (2010); Ark. Code Ann. § 5-36-106 (2006); Fla. Stat. Ann. § 812.019 (West 2006); Ga. Code Ann. § 16-8-7(a) (2007); 720 Ill. Comp. Stat. Ann. 5/16-1(a)(4) (LexisNexis 2008); Iowa Code Ann. § 714.1(4) (West 2003 & Cum. Supp. 2011); Ohio Rev. Code Ann. § 2913.51(A) (LexisNexis 2006); Or. Rev. Stat. § 164.095(1) (2007).

has probably been stolen";[17] "knowing that it has been acquired under circumstances amounting to theft, or believing that it has been so acquired";[18] "knowing that it has been stolen, or believing that it has probably been stolen";[19] and "knowing that it has been stolen, or believing that it has been stolen."[20] These statutes and § 28-517 impose a standard of culpability which prohibits an imposition of liability for the negligent receiving of stolen property.

In contrast, other jurisdictions provide that a person is guilty of criminal receiving when a person receives stolen property with "good reason to believe";[21] "under such circumstances as would reasonably induce him to believe";[22] "which he knows or should know";[23] with "reasonable cause to believe";[24] or having "good reason to know"[25] that the property was stolen. Such statutes impose a negligent, and thus objective, standard of liability. Because § 28-517 contains no such language, the imposition of a "reasonable prudent person" standard does not comport with our law.

When a subjective standard of knowledge is dictated by a criminal receiving statute, the requirement has long been analyzed in this manner:

> [The legislature] used the word "knowing," and defined the crime as the purchase of stolen property by one having knowledge of the theft. It might have denounced as a crime the receipt of stolen property under conditions

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[17] Conn. Gen. Stat. Ann. § 53a-119(8). See Me. Rev. Stat. Ann. tit. 17-A, § 359(1).

[18] Del. Code. Ann. tit. 11, § 851.

[19] N.H. Rev. Stat. Ann. § 637:7(I); 18 Pa. Cons. Stat. Ann. § 3925(a). See, N.J. Stat. Ann. § 2C:20-7; S.D. Codified Laws § 22-30A-7; Utah Code Ann. § 76-6-408(1).

[20] Mo. Ann. Stat. § 570.080; Neb. Rev. Stat. § 28-517. See N.M. Stat. Ann. § 30-16-11(A).

[21] Ark. Code Ann. § 5-36-106.

[22] 720 Ill. Comp. Stat. Ann. 5/16-1(a)(4).

[23] Ga. Code Ann. § 16-8-7(a). See Fla. Stat. Ann. § 812.019.

[24] Iowa Code Ann. § 714.1(4); Ohio Rev. Code Ann. § 2913.51(A).

[25] Or. Rev. Stat. § 164.095(1).

> sufficient to create a suspicion in the mind of a reasonable man, but it did not do so. The gist of the offense is the actual state of the defendant's mind when he purchases the property, and not what, under like circumstances, might be the state of mind of some other person; the standard by which guilty knowledge is to be imputed is the defendant's mental attitude, and not that of the imaginary average man. . . . Knowledge may be inferred from circumstances. Anything amounting to notice, whether such notice be direct or indirect, positive or inferential, will satisfy the statute. But, even so, the ultimate fact which the jury must find before a conviction is warranted is that the defendant had such knowledge; and knowledge is something more than a suspicion. Moreover, circumstances which would create a strong suspicion in the mind of one man might have little significance for another, and one is not to be convicted of a crime because he is of a less suspicious nature than the ordinary man, and where, therefore, he may have acted in entire good faith in the face of conditions which might have put another upon his guard.[26]

The model federal jury instruction for criminal receiving reflects the same:

> In deciding whether the defendant knew the property was stolen at the time of its sale or receipt, you must focus upon his actual knowledge at that time. Even if you find that a prudent person would have known that the property was stolen at the time of its sale or receipt, if you find that the defendant did not know, then you cannot find the defendant guilty.[27]

It is clear that § 28-517 and the Model Penal Code impose a subjective standard of knowledge or belief, as opposed to the objective standard imposed by those jurisdictions which require

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[26] *Peterson v. United States*, 213 F. 920, 922-23 (9th Cir. 1914) (interpreting Federal Penal Code of 1910).

[27] 3 Leonard B. Sand et al., Modern Federal Jury Instructions—Criminal, § 54-56 at 54-109 (2005).

only a showing of "reasonable grounds for believing the property stolen."

As stated above, the court accepted the State's proposed instruction over Almasaudi's objection and submitted the instruction as jury instruction No. 7. It read in part: "'Knowingly' is defined as having actual knowledge that an item is stolen or that the surrounding facts would lead a reasonable prudent person to believe an item is stolen." The State's proposed instruction imposed an objective standard and directed the jury to consider a "reasonable prudent person." Almasaudi argues that the instruction given is therefore contrary to law. We agree, and determine that the objective standard of a "reasonable prudent person" is contrary to our criminal receiving statute and relevant case law.

The instruction proposed by the State and given to the jury in this case is contrary to the requirement of subjective knowledge or belief as prescribed by statute. In a prosecution for receiving stolen property, the court must instruct the jury on the subjective standard of "knowing . . . or believing" as it is used in § 28-517.

[6,7] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.[28] Before an error in the giving of jury instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant.[29]

Jury instruction No. 7 allowed the jury to convict Almasaudi on a showing of objective, rather than subjective, knowledge or belief. This permitted the jury to convict Almasaudi on a much broader standard of liability than that which is contemplated by § 28-517. Therefore, we determine that Almasaudi was prejudiced by the instruction and that the judgment should be reversed. An instruction directing the jury to apply an objective standard to the knowledge requirement is contrary to law and fails to conform to the criminal code.

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[28] *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

[29] *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010).

2. Sufficiency of Evidence

[8] Having found reversible error, we must determine whether the totality of the evidence admitted by the district court was sufficient to sustain Almasaudi's conviction. If it was not, then concepts of double jeopardy would not allow a remand for a new trial.[30] The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court would have been sufficient to sustain a guilty verdict.[31] We find that Almasaudi's statements to the police and the circumstantial evidence against him were sufficient to sustain the verdict. We therefore reverse the conviction and remand the cause for a new trial.

3. Remaining Assignments of Error

Almasaudi also argues that the State did not properly establish the value of the stolen tiller to sustain the conviction on count II and that the district court erred in admitting evidence of "prior bad acts" in violation of rules 403 and 404(2). Although the foregoing determination resolves this appeal, we address these issues because they are likely to recur on remand.

(a) Valuation of Stolen Property

[9] Section 28-518(8) states: "In any prosecution for theft under sections 28-509 to 28-518, value shall be an essential element of the offense that must be proved beyond a reasonable doubt." The statutory language of § 28-518(8) requires only that some value be proved as an element of a theft offense, not that a particular threshold value be proved as an element of the offense.[32]

> 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*

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[30] See *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[31] See *id.*

[32] *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002).

> *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.
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> . . . [W]hile § 28-518(8) now requires that intrinsic value be proved beyond a reasonable doubt as an element of the offense, proof of a specific value at the time of the theft is necessary only for gradation of the offense.[33]

It has long been the rule in this jurisdiction that the owner of chattels may testify as to their value in a criminal case.[34] Because the owner of the tiller testified to its value, we find that a rational trier of fact could have found that the tiller had some value. This is all that is required to support a conviction on a theft offense. Almasaudi's argument is therefore without merit.

(b) Rule 404(2) Evidence

Almasaudi asserts that the court erred in permitting the introduction of evidence of prior bad acts in violation of rules 403 and 404(2). As a threshold matter, we must determine whether Almasaudi's continuing objection preserved this issue for appeal. The failure to make a timely objection waives the right to assert prejudicial error on appeal.[35]

Almasaudi made a motion in limine seeking to exclude, among other things, "any theft allegation or offense, or any other offense, including any convictions thereof, that may be alleged to have occurred at any time or date other than the date charged in the information," pursuant to rules 403 and 404. Thereafter, Almasaudi filed a supplemental motion seeking to exclude the admission of portions of videotaped interviews between law enforcement and Almasaudi and specific lines of the transcribed interviews. These motions were overruled. The State offered the taped interviews for the purported purpose of establishing that Almasaudi had knowledge that the items he purchased from Vandry were stolen—because he received them at a cheap price, he engaged in other questionable transactions

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[33] *Id.* at 169, 638 N.W.2d at 863 (emphasis in original).

[34] *State v. Holland*, 213 Neb. 170, 328 N.W.2d 205 (1982).

[35] *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008).

with Vandry to purchase gas, and he spent a large portion of his income on these items. Almasaudi did not specifically object when DVD copies of the interviews were offered into evidence or when they were played for the jury. The district court admitted the evidence at trial. Almasaudi argues its admission constituted error.

Because overruling a motion in limine is not a final ruling on admissibility of evidence and, therefore, does not present a question for appellate review, a question concerning admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection to the evidence during trial.[36] Prior to trial, Almasaudi made a continuing objection to "those matters that were overruled" on the motion in limine. The court granted Almasaudi a standing objection. The matters contained in the motion in limine and supplemental motion filed by Almasaudi included portions of the transcribed interviews and their corresponding video. We determine that Almasaudi's continuing objection to the matters overruled on his motions in limine preserved the issue for our review.

Almasaudi argues that the district court erred in admitting the taped interviews, because they contain evidence of prior bad acts inadmissible under rule 404(2). Almasaudi argues that the evidence was not admitted for a proper purpose. He does not take issue with the limiting instruction given by the court, nor does he assert that he was not sufficiently informed of the proper purpose for which the evidence was admitted. For the following reasons, we find Almasaudi's arguments to be without merit.

The district court was unclear as to whether the evidence was ruled admissible for a proper purpose under rule 404(2) or whether the evidence was admissible because it was not covered by rule 404. The court stated that it did not think that the evidence was "404 evidence." But it also stated that such evidence was relevant to show knowledge and gave a limiting instruction. On appeal, the State argues that the evidence is not

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[36] *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992).

part of rule 404(2) coverage, because it forms an integral part of the crimes charged.[37]

This court has recognized the rule that prior conduct which is inextricably intertwined with the charged crime is not considered extrinsic evidence of other crimes or bad acts and that, therefore, rule 404 does not apply.[38] Evidence of such acts is sometimes termed "'same transaction evidence.'"[39] We have applied this exception to rule 404 coverage in cases where the acts were inextricably intertwined with the charged offense and committed as part of a continuing crime to carry out the same objective,[40] in furtherance of the same crime spree,[41] and to conceal previous crimes,[42] and when the conduct was necessary to show a coherent picture of the facts of the crime charged.[43]

The evidence admitted in Almasaudi's case is significantly different from the evidence considered in cases where we have found rule 404 inapplicable. The evidence admitted regarding Almasaudi's previous dealings with Vandry is not "same transaction evidence." Such dealings are previous transactions separate and distinct from the transactions forming the charged conduct. Further, Almasaudi's previous dealings with Vandry are not necessary to show a coherent picture of the facts, nor do they form an integral part of the crimes charged. The previous dealings constitute unrelated acts that were not interwoven with the charged crimes. Accordingly, we determine the evidence falls under rule 404 coverage, and we address the admissibility of the evidence under rule 404(2).

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[37] See *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

[38] *Id.*

[39] See *U.S. v. Forcelle*, 86 F.3d 838, 841 n.1 (8th Cir. 1996).

[40] *Id.*

[41] See *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

[42] See *id.*

[43] *State v. Baker, supra* note 3; *State v. Robinson*, *supra* note 41; *State v. Wisinski*, *supra* note 37; *State v. McPherson*, 266 Neb. 734, 668 N.W.2d 504 (2003); *State v. Aguilar*, 264 Neb. 899, 652 N.W.2d 894 (2002); *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002).

Before the prosecution may offer evidence of other crimes, wrongs, or acts pursuant to rule 404(2), it must first prove to the trial court, out of the presence of the jury and by clear and convincing evidence, that the accused committed the crime, wrong, or act.[44] Almasaudi does not argue on appeal that the State failed to prove by clear and convincing evidence that he participated in prior dealings with Vandry. Therefore, we do not address this issue.

[10-13] Rule 404(2) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(2) prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner.[45] But evidence of other bad acts which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2).[46] Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means that its relevance does not depend upon its tendency to show propensity.[47] An appellate court's analysis under rule 404(2) considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.[48]

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[44] *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

[45] *State v. Baker, supra* note 3.

[46] See *id.*

[47] *Id.*

[48] *Id.*

A proponent of evidence offered pursuant to rule 404(2) shall, upon objection to its admissibility, be required to state on the record the specific purpose or purposes for which the evidence is being offered, and the trial court shall similarly state the purpose or purposes for which such evidence is received.[49] And any limiting instruction given upon receipt of such evidence shall likewise identify only those specific purposes for which the evidence was received.[50]

The court overruled Almasaudi's objection to the admission of the evidence and his motion for a mistrial related to the allegedly improper admission of the evidence. The State asserted the evidence was being offered for lack of mistake or knowledge that the property was stolen. The State also stated that it did not object to the court's giving a limiting instruction regarding the evidence.

The court issued the following oral limiting instruction:

> Members of the jury, you have heard statements by . . . Almasaudi during the interviews by police officers involving incidents that do not involve the specific charges in this case such as the use of credit cards by . . . Vandry and others and the purchase of other property by . . . Almasaudi from . . . Vandry. This evidence should be considered by you solely, if at all, to show . . . Almasaudi's knowledge or absence of mistake involving the property which is the subject of the charges in this case.

The jury was also given a written limiting instruction which read: "During this trial I called your attention to certain evidence that was received for specified limited purposes; you must consider that evidence only for those limited purposes and for no other."

Knowledge is an essential element of the crime of theft by receiving, and, as stated above, knowledge may be inferred from the circumstances surrounding the criminal act.[51] Normally, absence of mistake is not at issue unless the defendant claims

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[49] *State v. Sanchez, supra* note 44.

[50] *Id.*

[51] *State v. LaFreniere, supra* note 8.

that his or her conduct in committing the charged crime was an accident or mistake, or the defendant's act could be criminal or innocent depending on the defendant's state of mind.[52] Almasaudi admitted he purchased the items from Vandry, but essentially argued that he did not know the items were stolen and that he unintentionally purchased stolen items.[53] Accordingly, both knowledge and absence of mistake were at issue below.

The evidence admitted focused on Almasaudi's relationship and dealings with Vandry. The evidence shows Almasaudi's knowledge of the pertinent facts surrounding his dealings with Vandry, all of which were closely related in time and character to the dealings which led to the charges brought against Almasaudi. Almasaudi had known Vandry only for a period of 3 months, and, during that time, Almasaudi took part in numerous transactions with Vandry. Almasaudi spent approximately $4,000 on the items he purchased. The transactions took place frequently over a short period of time. The record indicates that each item or service Almasaudi purchased from Vandry was acquired for far less consideration than its reasonable value. Each interaction between Almasaudi and Vandry informs the issue of whether Almasaudi knew he was purchasing stolen goods. And the taped interviews which were admitted deal directly with whether Almasaudi knew or believed the items to be stolen. The evidence of conduct relating to the prior dealings was substantially similar to the charged incidents and was probative of Almasaudi's knowledge and absence of mistake. We therefore conclude that the evidence of Almasaudi's relationship with Vandry and their prior dealings was relevant for a proper purpose under rule 404(2).

We next consider whether the probative value of such evidence was substantially outweighed by its potential for unfair prejudice. The incidents admitted into evidence all occurred

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[52] See, *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007) (citing *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973)); *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001).

[53] See *State v. Trotter, supra* note 52.

within a period of 3 months. As we noted in *State v. Floyd*,[54] such proximity in time suggests a higher probative value than if the incidents had been more remote in time. The evidence was relevant to show knowledge, an essential element of the crimes charged. And the record does not indicate that the taped interviews suggested a decision on an improper basis. We therefore conclude that the probative value of the evidence was not outweighed by the potential for unfair prejudice.

Limiting instructions were given to the jury regarding the admission of evidence relating to Almasaudi's prior dealings with Vandry. The instructions properly indicated that the evidence was to be considered to determine Almasaudi's knowledge regarding the property at issue in the case.

We conclude that the district court did not abuse its discretion in admitting evidence of Almasaudi's prior dealings with Vandry, because the evidence was admitted for the proper purposes of knowledge and absence of mistake. Because we determine the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice, we need not further address this issue in relation to Almasaudi's assignment of error regarding rules 403 and 404(2).

VI. CONCLUSION

For the foregoing reasons, we determine that Almasaudi was prejudiced by the court's erroneous instruction on the definition of "knowingly." Accordingly, we reverse the judgment of the district court and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

CONNOLLY, J., participating on briefs.

WRIGHT, J., not participating.

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[54] *State v. Floyd*, 277 Neb. 502, 763 N.W.2d 91 (2009).