

NOT DESIGNATED FOR PUBLICATION

No. 101,165

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ASHLEY REED,
Appellant.

MEMORANDUM OPINION

Appeal from Reno District Court; TIMOTHY J. CHAMBERS, judge. Opinion filed December 11, 2009. Reversed and remanded.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, and *Katie M. Whitsitt*, legal intern, for appellant.

Stephen D. Maxwell, senior assistant district attorney, *Keith E. Schroeder*, district attorney, and *Steve Six*, attorney general, for appellee.

Before GREENE, P.J., MALONE, J., and KNUDSON, S.J.

GREENE, J.: Ashley Reed appeals her conviction of one count of felony criminal damage to property, arguing evidentiary error, instruction error, and insufficient evidence to support her conviction. Concluding that there was sufficient evidence to support the conviction but also concluding the district court erred in failing to give a lesser included

instruction, we must reverse Reed's conviction, vacate her sentence, and remand the case for a new trial.

In May 2007, Reed allegedly threw a hammer at Chris Voellmer's 2006 Chevy Silverado pickup truck, allegedly damaging the truck to the extent of \$1,165.64. The State charged Reed with one count of felony criminal damage to property in violation of K.S.A. 21-3720(a)(1). During the trial, Reed objected to the admission of the repair bill, but the court overruled her objection. During the instruction conference, Reed requested the jury be instructed on the lesser included offense of misdemeanor criminal damage to property, but the court denied her request. The jury found Reed guilty of the felony count, and she was sentenced to 12 months' probation with county jail time of 30 days imposed as a condition of probation. She timely appeals her conviction.

Reed challenges the sufficiency of the evidence to support her conviction, arguing that the State failed to prove the value of the truck, citing *State v. Towner*, 202 Kan. 25, 29-30, 446 P.2d 719 (1968). The offense of criminal damage to property is defined at K.S.A. 21-3720 as follows:

"(a) Criminal damage to property is by means other than by fire or explosive:

(1) Intentionally injuring, damaging, mutilating, defacing, destroying, or substantially impairing the use of any property in which another has an interest without the consent of such other person; or

(2) injuring, damaging, mutilating, defacing, destroying, or substantially impairing the use of any property with intent to injure or defraud an insurer or lienholder.

"(b)(1) Criminal damage to property is a severity level 7, nonperson felony if the property is damaged to the extent of \$25,000 or more.

(2) Criminal damage to property is a severity level 9, nonperson felony if the property is damaged to the extent of at least \$1,000 but less than \$25,000.

(3) Criminal damage to property is a class B nonperson misdemeanor if the property damaged is of the value of less than \$1,000 or is of the value of \$1,000 or more and is damaged to the extent of less than \$1,000."

The problem here is that given evidence to establish damage to the extent of \$1,165 but absent evidence that the value of the truck exceeded \$1,000, Reed could not be convicted of the felony offense under K.S.A. 21-3720(b)(2). Even though that subsection does not require evidence of value, it is clear that the legislature intended for damage to the extent of at least \$1,000 to an object of property valued at less than \$1,000 should be charged as a misdemeanor. Reed argues that without some evidence that the value of Voellmer's truck exceeded \$1,000, there was insufficient evidence to support her felony conviction.

We concede that an examination of *Towner* (which is not a criminal damage to property case) and the more recent case of *State v. Jones*, 247 Kan. 537, 802 P.2d 333 (1990), *overruled on other grounds State v. Gunby*, 282 Kan. 39, 144 P.3d 647 (2006), established minimum standards for proving the value of the property that was damaged. In *Towner*, the court stated:

"All that was shown was the make, year and model of the automobile, that it was second hand and operable. At the time taken it was approximately eight years old. Although from the description the vehicle could be inferred to be of some intrinsic value and could be inferred to be of a value sufficient to support a conviction of the offense of petty larceny (52 C.J.S., Larceny, § 133a), we are cited to no authority or line of reasoning whereby from the showing made the inference could be drawn that the vehicle in question was of value of \$50.00 or more, and we know of none.

"We would not say the diacritical amount could never be inferred in a particular case where property has been sufficiently described or exhibited to the trier of the fact. However, prices of automobiles of the vintage in question are negotiable over a considerable range and are in part at least dependent upon condition. Possibly this vehicle was in fact worth \$50.00 but upon the showing made, this fact would not be a matter of unquestionable common knowledge. We think the only safe rule is that the prosecution be required to make a sufficient showing and that was not done here." *Towner*, 202 Kan. at 29-30.

Reviewing the record with care, we find that the evidence supporting a value of the damaged truck consisted of its make and model (Chevy Silverado pickup), its vintage (2006), its mileage (37,000 miles), and its condition from photos (appears in good condition). Thus, the jury knew that the truck was no more than 18 months old at the time of the incident. The question is whether this evidence was sufficient for the jury to infer a value in excess of \$1,000. We conclude it was sufficient and that the conviction is adequately supported by this evidence.

This conclusion does not end our analysis, however, because the district court refused to instruct the jury on the lesser included offense of misdemeanor criminal damage to property when that instruction was clearly proper given the rather scant evidence of value and the defense argument that value had not been established. Viewing that evidence in the light most favorable to the requesting party, as we are required to do in determining whether there was error of this nature, the lesser included instruction should have been given. See *State v. Henson*, 287 Kan. 574, 586, 197 P.3d 456 (2008).

Accordingly, we are obligated to remand this case for a new trial where the jury can decide whether the value of the truck exceeded \$1,000 and was damaged to the extent of at least \$1,000 to support a felony conviction and, if not, whether Reed should be convicted of misdemeanor criminal damage to property.

Given these conclusions, Reed's challenge to the evidentiary ruling is moot. To assist the court on remand, however, we note that if the owner of the truck testifies to the actual cost of repair, the repair bill would be cumulative evidence, and its admission would be harmless even if technically hearsay. In the absence of such testimony, however, and if offered to show the extent or cost of repair, the repair bill would be objectionable hearsay without the presence or testimony of its maker/declarant. See *State v. Guhl*, 3 Kan. App. 2d 59, 588 P.2d 957, rev. denied 225 Kan. 846 (1979).

Reversed and remanded for new trial.