

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

THE STATE OF NEBRASKA,
Plaintiff,

Case No. CR01-20

vs.

**VERDICT
AND ORDER**

DEAN MINER,
Defendant.

DATE OF PROCEEDINGS: May 13, 2002.

APPEARANCES:

For plaintiff: Thomas P. Herzog, Holt County Attorney.

For defendant: Douglas J. Stratton with defendant.

SUBJECT: Pronouncement of verdict following bench trial.

PROCEEDINGS:

Prior to pronouncement of verdict, the court reviewed the substitution of photographs for Exhibit 69 that had been stipulated by the parties. Both counsel acknowledged that the photographs on substitute Exhibit 69 fairly and accurately depict the physical object originally marked as Exhibit 69.

The court pronounced verdict and orders relating thereto. The plaintiff moved to increase bond. Arguments of counsel were heard. Order pronounced thereon.

FINDINGS: The court finds and concludes:

1. The plaintiff has the burden of proving each and every element of the offense by proof beyond a reasonable doubt. The information charged the offense of theft by unlawful taking.¹ The crime of theft by unlawful taking requires the state to prove that: (a) the defendant took or exercised control over movable property, (b) the property belonged to another, (c) the defendant intended to deprive the other person of the property, (d) the date of the taking, (e) the taking occurred in the county, and (f) the value of the property taken.²

¹ *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996), *cert. denied*, 519 U.S. 927, 117 S.Ct. 293, 136 L.Ed.2d 213.

² NEB. REV. STAT. §§ 28-511 and 28-518 (Reissue 1995).

2. The evidence is overwhelming and undisputed that: (a) someone took and exercised control over 62 head of steer cattle, (b) those cattle constituted movable property, (c) the cattle belonged to another, namely Wynn Hipke, (d) the person taking them intended to deprive Hipke of the cattle, (e) the cattle were taken on or about March 20, 2001, (f) the cattle were taken from the Atkinson Livestock Market premises in Holt County, Nebraska, and, (g) the value of the cattle greatly exceeded \$1,500.00. However, there is no direct evidence that the defendant was the person who took the cattle. No witness testified to any observation of the actual taking.

3. A conviction may rest solely on circumstantial evidence.³ One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt.⁴ The law does not require the state to disprove every hypothesis consistent with the defendant's presumed innocence.⁵

4. Identification is an essential element in establishing guilt beyond a reasonable doubt.⁶ Identification can be inferred from all the facts and circumstances in the evidence.⁷ An "alibi" constitutes an attempt by the defendant to demonstrate he did not commit the crime because, at the time, he was in another place so far away or in a situation preventing his doing the thing charged against him.⁸ Alibi evidence is merely rebuttal evidence directed to that part of the state's evidence which tends to identify the defendant as the person who committed the alleged crime.⁹ Evidence tending to prove an alibi does not destroy the sufficiency of the evidence to support a finding of guilt, but only presents conflicting evidence

³ *State v. Durst*, 232 Neb. 639, 441 N.W.2d 627 (1989); *State v. Trimble*, 220 Neb. 639, 371 N.W.2d 302 (1985).

⁴ *Id.*

⁵ *State v. Mowry*, 245 Neb. 213, 512 N.W.2d 140 (1994); *State v. Badami*, 235 Neb. 118, 453 N.W.2d 746 (1990).

⁶ *State v. Durst, supra.*

⁷ *State v. Durst, supra*; *State v. Kaba*, 217 Neb. 81, 349 N.W.2d 627 (1984).

⁸ *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987).

⁹ *Id.*

on a question of fact.¹⁰ The defendant is not required to prove an alibi.¹¹ It is sufficient to entitle the defendant to an acquittal if the trier of fact entertains a reasonable doubt of the defendant's presence at the commission of the crime, whether such doubt arises from a failure of proof on the part of the state or from evidence submitted by the accused.¹²

5. The evidence shows without dispute that the defendant possessed the stolen Hipke cattle when he brought them for sale on Wednesday and Friday of the same week. Indeed, the defendant did not dispute that he sold the cattle. The evidence similarly demonstrates that the defendant possessed the means of transportation of the cattle with his semi-tractor and trailer.

6. The court has carefully considered the testimony of the defendant and his principal alibi witness, Leota Rankin. Leota Rankin's testimony lacks substantial credibility. Her memory appears and disappears at her convenience. The defendant's testimony relies on a totally implausible combination of facts, including, among others, the theft accomplished by semi-tractor and trailer but delivered to his pasture by horse or stock trailer within 24 hours, the disappearance of his branding iron and subsequent reappearance without explanation, and the defendant's total absence of care and concern regarding the particular cattle being sold. Even this court, without personal experience in reading and dealing with brands on a regular basis, could observe compelling photographic evidence of the obviously altered brand. The notion that the defendant, who is an experienced livestock producer and trucker, would cavalierly ignore such abuse of his own brand onto another person's brand is utterly unpersuasive. The concept of reasonable doubt does not require this court to abandon common sense.

7. The state has met its burden to establish each and every element of the crime charged beyond a reasonable doubt, and the court finds the defendant guilty of the crime of theft by unlawful taking. The court determines the value of the property taken to be \$39,501.60. The crime constitutes a Class III felony.

ORDER: IT IS THEREFORE ORDERED that:

¹⁰ *State v. Sutton*, 220 Neb. 128, 368 N.W.2d 492 (1985).

¹¹ *Casey v. State*, 49 Neb. 403, 68 N.W. 643 (1896).

¹² *Id.*

1. The defendant, Dean Miner, is adjudged guilty of the crime of theft by unlawful taking, a Class III felony.

2. Sentencing is deferred and set for **Monday, July 22, 2002, at 9:00 a.m.**, or as soon thereafter as the same may be heard.

3. A presentence investigation shall be conducted, and the clerk is directed to notify the probation officer thereof.

4. Restitution hearing is set for **Monday, July 15, 2002, at 1:30 p.m.**, or as soon thereafter as the same may be heard.

5. The plaintiff's motion to increase bond is granted to the extent that the bond reporting requirement is modified to require the defendant to report in person to the Platte County Sheriff's office in person on Tuesday, Thursday, and Saturday of each week, and deleting the telephone reporting requirement to the Merrick County Sheriff's office. The defendant's bond, as modified, is continued, and the defendant is ordered to appear for all further proceedings and reminded of the consequences for failure to appear.

Signed at **O'Neill**, Nebraska, on **May 13, 2002**;
DEEMED ENTERED upon file stamp date by court clerk.
If checked, the court clerk shall:

- Mail a copy of this order to all counsel of record and any pro se parties.
Done on _____, 20____ by _____.
- If not already done, immediately transcribe trial docket entry dictated in open court.
Done on _____, 20____ by _____.

BY THE COURT:

William B. Cassel
District Judge

Mailed to: