

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

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STATE OF IOWA,

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217

Plaintiff-Appellee,

)

vs.

)

6-452

86-611

THOMAS D. OVERTON,

)

Defendant-Appellant.

)

Appeal from the Iowa District Court for Scott County (No. 12211-01) - Linda K. Neuman, Judge.

Defendant appeals his conviction for theft in the second degree in violation of Iowa Code §§714.1(4) and 714.2(2) (1985) asserting he was denied effective assistance of counsel by trial counsel's failure to properly object to the allegedly prejudicial remarks made by the prosecutor in his closing statement. **AFFIRMED.**

Charles Harrington, Appellate Defender, and Linda Del Gallo, Assisant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Ann DiDonato, Assistant Attorney General; and R. Douglas Wells, Assistant Scott County Attorney, for plaintiff-appellee.

Considered by Donielson, P.J., and Schlegel, and Sackett, JJ.

SACKETT, J.

Defendant Thomas Overton appeals from his conviction, following a jury trial, for theft in the second degree in violation of Iowa Code §§714.1(4) and 714.2(2) (1985). Defendant contends he was denied his right of effective assistance of counsel by trial counsel's failure to properly object to allegedly prejudicial remarks made by the prosecutor in his closing statement. Defendant asserts the prosecutor's remarks regarding the allegedly general knowledge of the stolen nature of goods sold in a certain area were objectionable because they were based upon the prosecutor's personal knowledge and not upon the record. Further, defendant asserts the prosecutor's remarks actually and substantially prejudiced his right to a fair trial because they addressed the key issue of whether defendant knew that the property he admittedly sold was stolen property. We affirm.

Sometime between July 3, 1985, and July 7, 1985, Sheryl Digman's home was burglarized. Sheryl had been remodeling the home after work and on weekends and was living elsewhere until the work was completed. She had taken the holiday weekend off from work on the home. When Sheryl returned on July 7, she discovered checkbooks, pearls and her brother's \$1,800 stereo were missing. Her brother, Steve Digman, had been storing the stereo at Sheryl's house.

On July 5, 1985, defendant met Louis Woods at the H & S Bicycle Club on Harrison Street. Defendant told Woods he had a stereo in his car which he wanted to sell. Woods purchased the stereo. Approximately two months later Woods pawned the cassette tape deck from the stereo unit. The tape deck showed up on a police stolen property list and police then questioned Woods. Woods told police he purchased the stereo from the defendant. While the defendant

admitted possessing and selling the stereo, he did not admit to any burglary and denied any knowledge that the stereo was stolen property.

The defendant was charged by trial information with second-degree theft. The jury returned a verdict of guilty as charged and determined the defendant was an habitual offender. Following the verdict, defendant's trial counsel filed a bill of exceptions. Trial counsel moved for a new trial and arrest of judgment due to the following remarks made by the prosecutor in his closing statement:

You must know what goes on down in that section of town. That's where people go to sell hot property. People who sell stolen stereos out of the back of their car in that part of town know perfectly well that those stereos are stolen.

The trial court overruled defendant's motions based on the substantial weight of evidence against the defendant. This appeal followed.

I.

Because we are confronted with an alleged constitutional violation, we resolve the issue by making our own independent evaluation of the totality of the circumstances. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980); State v. Conger, 375 N.W.2d 278, 279 (Iowa App. 1985). This is equivalent to a de novo review. Hinkle, 290 N.W.2d at 30. The burden of proof is on defendant to show the allegations of ineffective assistance complained of put him to actual and substantial disadvantage of constitutional magnitude. Polly v. State, 355 N.W.2d 849, 854 (Iowa 1984).

II.

Defendant argues he was denied effective assistance of counsel as secured by the sixth amendment. The defendant contends the prosecutor's comments were objectionable personal remarks not supported by the record. He further argues these remarks actually and substantially prejudiced his right to a fair

trial by addressing the pivotal issue of whether defendant knew the property was stolen. The defendant maintains his trial counsel's failure to object to these remarks when they were made constituted ineffective assistance of counsel. Defendant seeks a new trial.

The state responds that the prosecutor's remarks were not objectionable because they were reasonable inferences drawn from the record. The state further argues any potential prejudice was cured by the trial court's instruction that comments in closing statements do not constitute evidence. In addition, the state argues the defendant was not actually and substantially prejudiced by the prosecutor's remarks because there is substantial independent evidence supporting defendant's conviction.

In determining whether a defendant has been denied effective assistance of counsel, the court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 2065-66, 80 L.Ed.2d 674, 693-95 (1984). The person claiming his trial attorney was ineffective must show the court that (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced the defense so as to deprive defendant of a fair trial. Strickland, 466 U.S. at 687, 104 S.Ct. at 2065, 80 L.Ed.2d at 693. Defendant has the burden to prove both elements by a preponderance of the evidence. Sallis v. Rhoades, 325 N.W.2d 121, 122 (Iowa 1982).

Defendant is not entitled to perfect representation, only that which is within the normal range of competency. State v. Halstead, 362 N.W.2d 504, 508 (Iowa 1985). In deciding whether trial counsel's performance was deficient, we require more than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently. Fryer

v. State, 325 N.W.2d 400, 413-15 (Iowa 1982). Where counsel makes reasonable decisions concerning strategy, regardless of the success or failure of such strategy, the reviewing court will not interfere simply because the strategy did not achieve the desired result. State v. Newman, 326 N.W.2d 788, 795 (Iowa 1982).

Rarely do we find failure to preserve error to be sufficiently egregious to deny defendant his right to effective assistance of counsel. Halstead, 362 N.W.2d at 508. In determining whether defendant was prejudiced by his counsel's performance, we require the person making the claim to show counsel's failure to perform an essential duty worked to the client's actual and substantial disadvantage. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). In Strickland the supreme court articulated a similar test for establishing prejudice:

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694, 104 S.Ct. at 1068, 80 L.Ed.2d at 698.

We need not determine whether trial counsel's performance was deficient before examining the prejudice component on an ineffectiveness claim. Strickland, 466 U.S. at 697, 104 S.Ct. at 2069, 80 L.Ed. 2d at 699 ("If it is easier to dispose of an ineffective claim on the ground of lack of prejudice . . . that course should be followed); Taylor, 352 N.W.2d at 685.

We reject defendant's argument the prosecutor's closing statements actually and substantially prejudiced him. We find there was substantial independent evidence that defendant knew the stereo he sold to Woods was stolen. As such, we agree with the state there is substantial independent evidence supporting defendant's conviction.

In the instant case defendant's possession of the stereo was recent and unexplained. The stereo was stolen between July 4, 1985, and July 7, 1985. Defendant admitted he sold the stereo to Woods on July 5, 1985. Woods testified at trial that defendant did not tell Woods he was selling the stereo for another person. In addition, defendant did not tell police he sold the stereo for another person and did not offer any other explanation why he had possession of and sold a stolen stereo.

Unexplained possession of recently stolen property by defendant justifies an inference that defendant illegally received it with guilty knowledge. State v. Dykers, 239 N.W.2d 855, 859 (Iowa 1976); State v. Houston, 211 N.W.2d 598, 600 (Iowa 1973). In addition, where the interval between the theft and defendant's sale of the property in question is sufficiently short, an inference may be drawn that defendant stole the property. State v. Jones, 289 N.W.2d 597, 599 (Iowa 1980). Such an inference comports with due process of law. Houston, 211 N.W.2d at 600 (citing Barnes v. United States, 411 U.S. 946, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973)). The underlying rationale of the inference is that due to the time element involved the possessor must have had either some involvement in or knowledge of the theft. Id.; State v. Post, 286 N.W.2d 195, 203 (Iowa 1979). See State v. McVey, 376 N.W.2d 585 (Iowa 1985) (Crime of theft based on exercising control over stolen property does not require proof of any intent beyond voluntary act of exercising prohibited control over property known to be stolen).

We determine that even apart from the prosecutor's closing statement there is substantial other evidence to support defendant's conviction. We therefore determine defendant did not suffer actual and substantial prejudice due to trial counsel's failure to object to remarks made by the prosecutor during his closing statement. We affirm the trial court.

AFFIRMED.