IN THE COURT OF APPEALS OF IOWA

No. 1999-475 (9-732) / 98-2168
Filed February 9, 2000

STATE OF IOWA,

Appellee,

vs.

DAVID PAUL STEIL,

Appellant.

FILED
FEB 0 9 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Dubuque County, R.J. Curnan, Judge.

David Paul Steil appeals from the judgment and sentence entered upon a jury verdict finding him guilty of second-degree theft. **REVERSED.**

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Fred H. McCaw, County Attorney, and Timothy J. Gallagher, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Zimmer, and Vaitheswaran, JJ.

ZIMMER, J.

David Paul Steil appeals from the judgment and sentence entered upon a jury verdict finding him guilty of second-degree theft. We reverse.

In December of 1997, Michael Feddersen stole a computer from his former employer, a Dubuque foundry. The following day, he sold the computer to the defendant, David Steil, and a woman named Amy McGovern, Steil's girlfriend at the time. In the exchange, Feddersen received cash and drugs totaling approximately $500 in value. In July 1998, Steil was charged with theft in the second degree based on his exercising control of stolen property, in violation of Iowa Code sections 714.1(4) and 714.2(2) (1997). After trial in October of 1998, the jury returned a verdict of guilty as charged.

Steil appeals and maintains his trial counsel was ineffective for failing to object to an outdated jury instruction defining the knowledge element of the exercising control offense.

I. Scope of Review. We review ineffective assistance of counsel claims de novo. *State v. Smothers,* 590 N.W.2d 721, 722 (Iowa 1999).

II. Ineffective Assistance of Counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must prove counsel failed to perform an essential duty and the failure resulted in prejudice. *State v. Westeen,* 591 N.W.2d 203, 207 (Iowa 1999). In looking at the second prong of the claim we ask whether trial counsel's failure created a reasonable probability that but for the trial attorney's unprofessional errors, the outcome would have been different. *See State v. Davis,* 584 N.W.2d 913, 918 (Iowa App. 1998). We address an ineffectiveness claim on

direct appeal when the record is clear and plausible strategy and tactical considerations do not explain counsel's actions. *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998).

The marshaling instruction in this case informed the jury that the State must prove the following elements:

> 1. The Gateway computer was stolen.
> 2. On or about the 23rd day of January, 1998, the Defendant exercised control over the property.
> 3. At the time, the Defendant knew or had reasonable cause to believe the property had been stolen.

Steil correctly points out the "reasonable cause to believe" standard of knowledge was long ago rejected by case law. *See State v. Hutt*, 330 N.W.2d 788, 789-90 (Iowa 1983); *State v. Ogle*, 367 N.W.2d 289, 292-93 (Iowa App. 1985). Although that element remains part of the statute, it is no longer part of the uniform instruction on the elements of exercising control over stolen property.[1]

> In *Hutt*, the Iowa Supreme Court decided the issue of
>
> whether proof that the accused has exercised control over stolen property in the face of facts which should reasonably lead him or her to believe that the property has been stolen is sufficient to sustain a conviction under subsection (4) of section 714.1, or, whether it is also a necessary element of that crime that the accused in fact believe that the property is stolen."

Hutt, 330 N.W.2d at 789. The court determined it was not enough to show facts that would reasonably cause an accused to believe the property was stolen. *Id.* at 789-790. Rather, a conviction under section 714.1(4) requires proof that a defendant actually knew or believed the property was stolen. *Id.* at 790. In *Ogle*,

---

[1] The conflict between the statute and uniform instruction may actually have been the source of the problem in this case. Originally, the court intended to use the uniform instruction. When discussing the

we applied the supreme court's holding in *Hutt* and invalidated an instruction substantially similar in language to the one before us today. *Ogle*, 367 N.W.2d at 292-293.

The instruction in this case is equally susceptible to an interpretation that requires the State to show only that the accused had knowledge of facts which would cause a reasonable person to believe the property was stolen. *See id.* at 292. The marshaling instruction was clearly wrong, as the State concedes. We find defense counsel's failure to recognize and object to the erroneous instruction breached an essential duty. *Hopkins*, 576 N.W.2d at 379-380. We can conceive of no trial strategy which explains the failure to object to the instruction, since it permits a conviction without a showing of actual knowledge.

We now turn to the prejudice prong. When trial counsel fails to object to an erroneous instruction, several factors militate against a finding of prejudice. *State v. Miles*, 344 N.W.2d 231, 235 (Iowa 1984). The first is where a separate instruction correctly informs the jury of the law. *See id.* Another is when the missing element is not a fighting issue in the case. *See id.* Finally, there may also be a lack of prejudice where there is so much evidence of guilt, no reasonable probability exists that the result would have been different, even if the instruction had been correct. *Hopkins*, 576 N.W.2d at 380.

We find there was a reasonable probability in this case that the result might have been different if the "reasonable cause to believe" option had not been available to the jury. Along with the issue of the value of the stolen property, Steil's

---

instructions, the State requested that the "reasonable cause to believe" language be added. The trial

knowledge was a fighting issue in the case. As Steil points out, the reasonable cause standard is substantially broader than the actual knowledge standard. The evidence in this case was much more compelling for conviction under the broader standard. Feddersen could not recall telling Steil the computer was stolen but only testified he thought Steil knew it was stolen from the low purchase price. Similarly, McGovern did not impute actual knowledge to Steil but only testified that *she* assumed the computer was stolen. While we do not opine on Steil's guilt, we conclude the instruction given created an unacceptable risk that the jury convicted under the wrong standard. Finding Steil's counsel breached an essential duty that worked actual prejudice, we reverse and remand for a new trial.

REVERSED.

---

court examined the statute and agreed to insert that language.