

IN THE COURT OF APPEALS OF IOWA

No. 7-034 / 96-0502

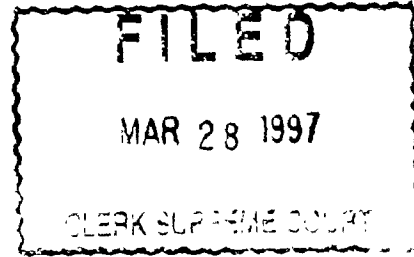
STATE OF IOWA,

Plaintiff-Appellee,

vs.

ROGER HINTON,

Defendant-Appellant.



Appeal from the Iowa District Court for Linn County, Thomas L. Koehler,
Judge.

Roger Hinton appeals the judgment and sentence entered upon his conviction
of second-degree theft in violation of Iowa Code sections 714.1(4) and 714.2(2)
(1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney
General, Denver D. Dillard, County Attorney, and Harold Denton, Assistant County
Attorney, for appellee.

Considered by Habhab, C.J., and Huitink and Vogel, JJ.

VOGEL, J.

The only issue defendant Hinton raises on direct appeal is claiming his trial counsel was ineffective for failing to request an instruction supporting his theory of defense. Hinton was charged with second-degree theft. His defense was that he had a claim of right to the items allegedly stolen. The jury found Hinton guilty as charged. Hinton appeals.

Scope of review. Our ultimate concern in claims of ineffective assistance is with the “fundamental fairness of the proceeding whose result is being challenged.” *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel’s conduct, keeping in mind the presumption that counsel performed competently. *Risdal*, 404 N.W.2d at 131. The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Id.* at 131-32.

Claim of ineffective assistance of counsel. We find the record sufficiently complete to resolve defendant’s claim on direct appeal. The jury was instructed as follows:

The State must prove all of the following elements of Theft.

1. (The items) were stolen.

2. On or about the 16th day of August, 1994, the defendant exercised control over the property.
3. At the time, the defendant *knew* the property had been stolen. (Emphasis added.)

If the State has proved all of the elements, the defendant is guilty. You must then determine the degree of Theft, as explained to you in Instruction No. 18. If the State has failed to prove any one of the elements, the defendant is not guilty.

Hinton's defense was that he did not know either item was stolen. He argues that his attorney should have requested an instruction of claim of right to the property as he had raised this defense at trial. At trial, Hinton testified he purchased an air compressor for \$200 and received a receipt from the seller, LaCoursiere. LaCoursiere, however, presented conflicting testimony. He testified the receipt for the air compressor bearing his signature--given by Hinton to the police as evidence of ownership--was not prepared by him and he denied he ever sold an air compressor to Hinton.

Nevertheless, it is the court's duty to instruct on all issues raised by the evidence. *State v. Jenkins*, 412 N.W.2d 174, 177 (Iowa 1987). However, a court need not instruct on both the affirmative and the negative of a proposition. *State v. Baker* 246 Iowa 215, 228, 66 N.W.2d 303, 310 (Iowa 1954). As instruction No. 12 included the words, "the defendant *knew* the property had been stolen," so an instruction of claim of right to the property would merely have been an instruction converse to the one given. Our criminal instruction No. 1400.19 provides a person

is not guilty of theft if he reasonably believes or has a right, privilege, or permission to the use the property in question. The jury could have chosen to not believe Hinton's testimony that he had a right to the property without a specific instruction. The jury returned a verdict of "guilty of theft" according to the instructions given. Accordingly, the jury found Hinton knew the items were stolen. We find no prejudice in failing to include a superfluous instruction.

We affirm Hinton's judgment and sentence, finding no merit to his claim of ineffective assistance of counsel.

AFFIRMED.