FILED
MAY 28 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

EVERETT ANTHONY NEMER, JR.,)

Defendant-Appellant.)

Filed May 28, 1987 336

7-129
86-1018

Appeal from the Iowa District Court for Linn County (AG 4090), Jane F. Spande, Associate Judge.

Defendant appeals from his conviction, following a jury trial, for theft in the third degree. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender; Dory A. Sutker and James F. Whalen, Assistant Appellate Defenders, for the defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Ann E. Brenden, Assistant Attorney General, for the plaintiff-appellee.

Considered by Snell, P.J., and Hayden and Sackett, JJ.

HAYDEN, J.

Defendant appeals his conviction, following a jury trial, for theft in the third degree in violation of Iowa Code sections 714.1(4) and 714.2(3) (1985). On appeal defendant contends: (1) trial counsel was ineffective for failing to object to opinion testimony as to his guilt or innocence; and (2) the evidence was insufficient to permit a jury to find he knew or had reasonable cause to believe the property in question was stolen.

In the summer of 1985, while cleaning out his father's garage, defendant discovered a partially disassembled motorcycle. Defendant notified his father of his discovery and they proceeded to call a friend, Detective Manchester of the Cedar Rapids Police Department. Detective Manchester went to the house, ascertained the vehicle's serial number and, upon reporting to the National Crime Information Center, discovered the vehicle was stolen. Through the detective's follow-up investigation it was discovered defendant's motorcycle had certain stolen parts attached to it. Defendant stated he had received the parts in an exchange for a pinball machine he had sold to a Jack Woods.

On September 5, 1985, the Linn County Attorney filed a trial information charging defendant with theft in the third degree. The case was tried to the jury on April 14, 1986, and the jury returned a guilty verdict the next day. Defendant's motions for new trial and in arrest of judgment were denied. Defendant was given a 120-day suspended sentence and placed on probation for two years. From this decision he appeals.

I.

Initially, we address defendant's contention that he has been denied ineffective assistance of counsel. The principles governing our resolution of this issue are well established. Because he alleges a violation of constitutional safeguards, we make an independent evaluation of the totality of circumstances.

State v. Losee, 353 N.W.2d 876, 878 (Iowa App. 1984). Therefore, our review is de novo. State v. Hillesheim, 291 N.W.2d 314, 316 (Iowa 1980).

Defendant contends that because of trial counsel's failure to properly and timely object to inadmissible opinion testimony he was rendered ineffective assistance of counsel in violation of his sixth amendment right. During direct examination of Detective Manchester, the following testimony was elicited by the prosecuting attorney:

> Q. You didn't think that Sam [Defendant] took the motorcycle, did you? A. No.
>
> Q. Did you think that Sam knew that the motorcycle was stolen?
>
> MR. CARR: Objection, calls for opinion of the witness, improper foundation.
>
> THE COURT: Objection is overruled.
>
> THE WITNESS: I can answer the question?
>
> THE COURT: You can answer.
>
> A. I think he knew in his own mind that the motorcycle was stolen. I do not know what he knew.
>
> Q. Okay. Would you have charged him—Would you have sworn out the complaint if you thought that he was innocent of theft? A. I was ordered to sign out that complain—and directed, I should say, to sign that complaint.
>
> Q. Well, I understand this, but I want to know if you thought that he was innocent, would you have sworn out the complaint? A. You're trying to use a black and white word for a gray area. He was not totally innocent. I did not believe he was totally innocent, but I was not going to sign a complaint.

"A witness is not permitted to express an opinion as to the ultimate fact of the accused's guilt or innocence." State v. Myers, 382 N.W.2d 91, 97 (Iowa 1986). But as defendant admits, this issue was not preserved for appeal. Rather, the contention on appeal is whether defendant's trial counsel's failure to object to this improper testimony was ineffective assistance of counsel. We conclude it was not.

In the test for ineffective assistance of counsel claims the defendant must show: (1) counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the sixth amendment, and (2) the deficient performance so prejudiced the defense as to deprive defendant of a fair trial. Strickland v. Washington, 466 U.S. 668, ___, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (Iowa 1984); State v. Losee, 354 N.W.2d 239, 243 (Iowa 1984).

The court in Strickland stated "although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same or even to address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at ___, 104 S. Ct. at 2069-70, 80 L. Ed. 2d at 699.

Regarding counsel's competency with respect to error preservation the court in State v. Halstead, 362 N.W.2d 504, 508-509 (Iowa 1985), provided:

> Rarely do we find failure to preserve error to be sufficiently egregious to deny defendant his right to the effective assistance of counsel under the sixth amendment to the United States Constitution. See State v. Goff, 342 N.W.2d 830 (Iowa 1983); Meier v. State, 337 N.W.2d 204 (Iowa 1983); State v. Hrbek, 336 N.W.2d 431 (Iowa 1983); State v. Schoelerman, 315 N.W.2d 67 (Iowa 1982); State v. Hendren, 311 N.W.2d 61 (Iowa 1981). These cases concerned the failure to participate actively in the trial, misadvice concerning mandatory minimum sentence prior to guilty plea, failure to address the question of voluntariness of inculpatory statements, and failure to object to marshalling instructions in kidnapping case omitting the specific intent element.

Along the same lines we find the defendant's trial counsel's failure to timely object was not sufficiently egregious to deny defendant his constitutional right to counsel.

II.

Defendant's other contention there was insufficient evidence in the record to find beyond a reasonable doubt defendant acted with the knowledge requirement of Iowa Code section 714.1(4)((1985). Our scope of review is at law for correction of errors only. Iowa R. App. P. 4.

When reviewing a challenge to the sufficiency of the evidence, we must view evidence in the light most favorable to the State. State v. Robinson, 288 N.W.2d 337, 338 (Iowa 1980). We will uphold a criminal verdict unless the record lacks substantial evidence to support it. State v. Mitchell, 371 N.W.2d 432 (Iowa App. 1985). "In the criminal law context, substantial evidence means such evidence as could convince a rational trier of fact that an element of a crime has been proved beyond a reasonable doubt." State v. Knupp, 310 N.W.2d 179, 182 (Iowa 1981) (emphasis added).

Section 714.1(4) (1985) requires such knowledge that is necessary for the State to establish that the accused actually did believe that the property was stolen. State v. Huff, 330 N.W.2d 788, 790 (Iowa 1983). The offense of exercising control over stolen property involves two factors: (1) the accused must exercise control over stolen property; and (2) the accused must do so with the knowledge the property was stolen. State v. Winders, 366 N.W.2d 193, 196 (Iowa App. 1985).

Although defendant contends he did not know the motorcycle parts he received were stolen, there is substantial evidence in the record from which a jury could find defendant guilty. If defendant's story is to be believed, he exchanged a pinball machine worth $80 for motorcycle parts worth from $150 to $200. A jury could have found such a significant difference in value would lead defendant to reasonably conclude the parts were stolen. This is particularly true in view of defendant's extensive experience with motorcycles. Viewing

the evidence in a light most favorable to the State, we find substantial evidence to uphold the verdict.

AFFIRMED.