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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

DENNIS ROSS SMITH,)

Defendant-Appellant.)

Filed January 28, 1987

6-368
85-1546

Appeal from the Iowa District Court for Tama County (No. 85-1546) - Thomas M. Horan, Judge.

Defendant appeals from his conviction for theft in the second degree, asserting that the evidence was insufficient to support a finding that he knew or believed that the property in question was stolen and that he was denied effective assistance by trial counsel's failure to object to instructions permitting the jury to find him guilty if he had reasonable cause to believe that the property had been stolen. **REMANDED FOR A NEW TRIAL.**

Charles Harrington, Chief Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; David L. Dorff, Asssistant Attorney General; and Richard R. Vander Mey, Assistant Tama County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., Donielson and Sackett, JJ.

OXBERGER, C.J. 232

The defendant, Dennis Ross Smith, appeals from his conviction following a jury trial for the offense of theft in the second degree in violation of Iowa Code sections 714.1(4) and 714.2(2)(1985). His first contention on appeal is that the evidence was insufficient to support the jury's finding that he knew or believed the property in question was stolen. In addition, the defendant argues that he was denied effective assistance of trial counsel because his attorney failed to object to an allegedly improper jury instruction. Because we think that the second issue is dispositive, we find it unnecessary to address the first, and remand the case for a new trial.

Initially, we must resolve a question regarding the preservation of error. The defendant did not challenge the jury instruction under attack in this appeal at the trial court level. Ordinarily, the failure to present an argument in the court below constitutes improper preservation of error and precludes appellate consideration of the issue. State v. Goff, 342 N.W.2d 830, 837 (Iowa 1983). We have recognized, however, that if the failure to preserve error resulted from ineffective assistance of counsel, appellate review may be granted. Id. at 837-38.

Generally, we decline from entertaining a claim of ineffective assistance of counsel on direct appeal. We prefer to resolve the question of ineffective assistance in a postconviction proceeding where a full record can be developed explaining the basis for the attorney's action. State v. Schoelerman, 315 N.W.2d 67, 71 (Iowa 1982). Nevertheless, we think that the record in the instant case is adequate to enable us to adjudicate the matter of counsel's effectiveness; as such, nothing further would be gained by requiring a hearing on the matter. See Schoelerman, 315 N.W.2d at 71-72. The test we apply in determining whether the defendant was rendered ineffective assistance is "whether under all

the circumstances counsel's performance was within the range of normal competency." Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980).

The record in the present case discloses that the defendant was arrested after a number of stolen items were found at the place where he was residing. In addition, a number of items stolen from the same place were found at the home of a friend of the defendant's; the defendant's friend testified that the defendant and his son brought the items over for storage. The defendant testified that his wife had received some of the items from her ex-boyfriend, and that she had acquired the others at a garage sale. After hearing the evidence, the jury found the defendant guilty of second degree theft.

Before reaching its decision, the jury was instructed by the trial court as follows:

INSTRUCTION NO. 9

> The law provides that a person commits theft when he exercises control over stolen property, knowing such property to have been stolen, or having reasonable cause to believe that such property has been stolen, unless the person's purpose is to promptly restore it to the owner or to deliver it to an appropriate public officer.

The defendant argues that his trial attorney provided ineffective assistance in failing to object to that portion of the instruction which provides that the jury may find the defendant guilty if he had "reasonable cause to believe [the] property was stolen." We agree.

In State v. Hutt, 330 N.W.2d 788, 789 (Iowa 1983), the supreme court was confronted with a substantially identical issue. The court in Hutt phrased the question before it as follows:

> [W]hether 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 believed that the property is stolen.

Hutt, 330 N.W.2d at 789. The court resolved this issue in favor of the latter interpretation. Accordingly, the court held that "it [is] necessary to establish that the accused actually did believe that the property was stolen." Id. at 790.

Similarly, in State v. Ogle, 367 N.W.2d 289, 292 (Iowa Ct. App. 1985), we found that the following instruction impermissibly lowered the State's burden of proof under section 714.1(4):

> The law provides that a person commits theft when he exercises control over stolen property, knowing such property to have been stolen, or having reasonable cause to believe that such property has been stolen.

Ogle, 367 N.W.2d at 292. We held that the trial court erred in applying the reasonable man standard to the issue of the defendant's knowledge. Because we have explicitly recognized that proof of actual knowledge is required in order to sustain a conviction under section 714.1(4), we conclude that the trial court in the case at bar erred in instructing the jury otherwise.

The State argues that even if the submission of the instruction was erroneous, the defendant cannot prevail because he has not demonstrated that the outcome of his case would have been different absent the alleged error. See Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984); see also Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674, 699 (1984). We cannot agree. The fighting issue in the present case was whether the defendant knew that the property had been stolen. By instructing the jury that it was sufficient if the defendant had "reasonable cause" to believe the property was stolen, the trial court effectively lowered the State's burden of proving the knowledge element. State v. Ogle, 367 N.W.2d at 293. See also State v. Goff, 342 N.W.2d 830, 837 (Iowa 1983); State v. Hutt, 330 N.W.2d at 789-90. Pursuant to the trial court's instruction, it is possible that the jury may have

believed the defendant's version of the facts, but nevertheless found him guilty because he had "reasonable cause" to believe the property was stolen. Such a result is inconsistent with the supreme court's decision in Hutt.

In short, we think that trial counsel's failure to object to the erroneous instruction placed his performance below the normal range of competency. See State v. Schoelerman, 315 N.W.2d at 71. We have discerned no valid justification for trial counsel's failure to object to the instruction and think that the defendant was prejudiced by the error. Accordingly, we hold that the defendant is entitled to a new trial.

REMANDED FOR A NEW TRIAL.