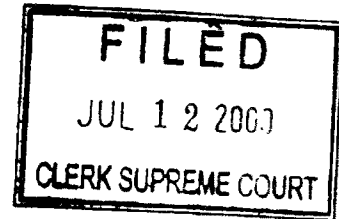


IN THE COURT OF APPEALS OF IOWA

No. 0-323 / 99-0972

Filed July 12, 2000



**STATE OF IOWA,
Plaintiff-Appellee,**

vs.

**RONALD RAY SHEPHERD,
Defendant-Appellant.**

Appeal from the Iowa District Court for Polk County, Linda R. Reade,
Judge.

Defendant appeals following his conviction for possession of an illegal gambling device. He contends the district court erred in finding sufficient evidence that he knowingly possessed an illegal device. He also contends his trial counsel was ineffective in failing to preserve issues as to the sufficiency of the evidence and in failing to object to the jury instructions. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney
General, John P. Sarcone, County Attorney, and Elizabeth Quinlan, Assistant
County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

SACKETT, C.J.

Defendant-Appellant, Ronald Shepherd, appeals following a jury's finding he was guilty of possession of a gambling device that is not an amusement device. The district court adjudged him guilty of the violation of Iowa Code section 725.16 (1997), gambling penalty, and Iowa Code section 99B.10(1), (2) and (3) (1997), electrical and mechanical amusement devices. Defendant contends: (1) there was not substantial evidence supporting his conviction; and (2) his trial attorney was ineffective when he failed to object to an instruction that only required the State to prove he was in possession of a gambling device that "can be designed or adapted to award a prize of merchandise exceeding five dollars in value or to award cash." We affirm.

On December 3, 1998, a DCI agent called defendant in response to an advertisement in the *Des Moines Register* offering slot machines for sale. The agent agreed to come to the defendant's apartment to look at the machines. The next day he met with defendant's wife who showed him some machines. The agent agreed to buy several machines and made a \$50.00 deposit and was given a receipt. The agent returned later with a search warrant authorizing a search of the defendant's apartment for illegal gambling devices and paperwork associated with the possession and sale of such devices. Thirty slot machines were seized and defendant was subsequently arrested.

Defendant was tried to a jury that found him "guilty of Possession of a Gambling Device that is not an Amusement Device." The district court found him guilty of possession of a gambling device in violation of Iowa Code sections

725.16 and 99B.10(1)(2)(3) and 902.9(4). He was sentenced to serve a prison term not to exceed five years. This appeal follows.

The statutes under which the defendant was charged and convicted appear in different sections of the code. The first, Iowa Code section 725.16 (1997), captioned "Gambling Penalty" provided:

[A] person who commits an offense declared in chapter 99B to be a misdemeanor shall be guilty of a serious misdemeanor except if an owner of an electrical or mechanical amusement device commits an offense in violation of section 99B.10, the owner is guilty of a class "D" felony.

The second statute, Iowa Code section 99B.10 (1997) comes under, Division III, "Games for which a License is Not Required" and is titled "Electrical and mechanical amusement devices". It provided:

[I]t is lawful to own, possess, and offer for use by any person at any person at any location an electrical or mechanical amusement device, but only if all of the following are complied with:

1. A prize of merchandise exceeding five dollars in value or cash shall not be awarded for use of the device. However, a mechanical or amusement device may be designed or adapted to award a prize or one or more free games or portions of games without payment of additional consideration by the participant.
2. An amusement device shall not be designed or adapted to cause or to enable a person to cause the release of free games or portions of games when designated as a potential award for use of the device, and shall not contain any meter or other measurement device for recording the number of free games or portions of games which are awarded.
3. An amusement device shall not be designed or adapted to enable a person using the device to increase the chances of winning free games or portions of games by paying more than is ordinarily required to play the game.

It is lawful for an individual other than an owner or promoter of an amusement device to operate an amusement device, whether or not the amusement device is owned, possessed or offered for use in compliance with this section.

The use of an amusement device which complies with this section shall not be deemed gambling.

Though neither statute defines prohibited conduct, there has been no challenge to the charges under these statutes and the case was tried as though section 99B.10 was a crime.¹

Defendant contends that there was not sufficient evidence he knowingly possessed an illegal gambling device. The defendant argument focuses on the State's failure to introduce evidence to show that the devices did not meet the three requirements of 99B.10 to be lawful.²

The State contends this issue was not raised in the district court. The defendant contends it was and if it were not his trial attorney was ineffective in failing to raise it. While not artfully preserved, a review of the proceedings before the district court convinces us that the district court had an opportunity to and did rule on this issue. See *State v. Holderness*, 293 N.W. 2d 226, 230 (Iowa 1980). We address each section of 99B.10 separately recognizing that to be legal the devices must be allowed under all three sections.

In reviewing insufficiency of the evidence challenges, we examine the evidence in the light most favorable to the State, and make all reasonable inferences that may fairly be drawn therefrom. *State v. Conroy*, 604 N.W.2d 636, 638 (Iowa 2000); *State v. McPhillips*, 580 N.W.2d 748, 753 (Iowa 1998). We consider all the facts, not just those which support the verdict, and will uphold a

1. Defendant was not charged with a violation of Iowa code 725.9 (1997) that prohibits the possession of gambling devices. The reason for enacting section 99B.10 was to establish that certain devices that might otherwise be deemed to be gambling devices under section 725.9 would not be so classified if they satisfied the requirements of Iowa code section 99B.10. See *H & Z Vending v. Iowa Dept. of Inspections & Appeals*, 511 N.W.2d 397, 398 (Iowa 1994).

2. The defendant and State appear to be in agreement that the State was responsible for providing this evidence and if the State did meet the burden of proof on this issue that it was sufficient to support a finding a crime had been committed. We address the issues as presented in the district court and on appeal. In doing so we do not decide whether charging defendant under the code sections which he was charged actually charged him with a crime.

jury's decision if it is supported by substantial evidence. *State v. Kostman*, 585 N.W.2d 209, 211 (Iowa 1998). Evidence is substantial if a rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt. *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994).

Defendant contends the devices were legal under section 99B.10(1) because the State failed to show a prize of merchandise exceeding five dollars in value or cash could be awarded for the use of the device. We disagree. There was evidence that the device took either tokens or quarters, which went into a hopper, which then could be cashed out when the machine awarded credits for its use. The agent testified he used the machine and was awarded credits.

Defendant next contends that the device was legal under 99B.10(2) because the reference to "free games" in that section is not the same as the "free credits" his device awarded. We disagree. There was evidence the "free credits" awarded by defendant's device can be played but they also can be released in the form of cash if quarters are put in the hopper.

Having determined that the device is not legal under Iowa Code section 99.10(1) or 99.10(2) we need not address defendant's claim that the State failed to show the device was illegal under 99.10(3) and elect not to do so.

Defendant next contends that his trial attorney was ineffective in failing to object to certain instructions given by the district court.

We review claims of ineffective assistance of counsel de novo. *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998). Ordinarily, we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct.

State v. Atley, 564 N.W.2d 817, 833 (Iowa 1997). However, we will resolve ineffective assistance of counsel claims on direct appeals when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998). The present record is sufficient to allow us to determine whether defense counsel was ineffective.

To prevail on a claim of ineffective assistance, a defendant must show that his counsel (1) failed to perform an essential duty and (2) that prejudice resulted from this failure. *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999). In order to meet the first test, one must overcome the "strong presumption" that his attorney's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996). To succeed on the second test he must show that, but for counsel's error, the result of the proceedings would have been different. *State v. Buck*, 510 N.W.2d 850, 858 (Iowa 1994). We may affirm if either element is lacking. *Greene*, 592 N.W.2d at 29.

The district court gave instruction twelve, which provided in applicable part:

INSTRUCTION NO. 12

The State must prove the following elements of Possession of a Gambling Device that is not an Amusement Device:

- (1) On or about December 4, 1998, in Polk County, the defendants knowingly were in possession of a device that:
 - (a) can be designed or adapted to award a prize or merchandise exceeding five dollars (\$5.00) in value or to award cash;

OR

(b) can be designed or adapted to cause or to enable a person to cause the release of free games when designated as a potential award for use of the devices and shall not contain any meter or other measurement device for recording the number of free games or portions of games which are awarded;

OR

(c) can be designed or adapted to enable a person using the device to increase the chances of winning free games or portions of games by paying more than is ordinarily required to play the game.

If you find the State has proved element (1)(a), (1)(b), or (1)(c), the defendant is guilty of Possession of a Gambling Device that is not an Amusement Device.

Defendant contends the instruction was in error because there is no language in the statute that the potential to adapt a machine is an offense.

We review challenges to jury instruction error at law. Iowa R. App. P. 4. An error in instructing the jury does not necessitate reversal unless it is prejudicial. *State v. Engle*, 590 N.W.2d 549, 551 (Iowa App. 1998); *State v. Seiler*, 342 N.W.2d 264, 268 (Iowa 1983). Jury instructions should state the applicable law. *State v. Marsh*, 392 N.W.2d 132, 133 (Iowa 1986).

We agree with the defendant that section 99B.10 makes no reference to the potential of a device to be changed to take or release credits. Consequently we agree with the defendant that the use of the words "can be" indicating a potential to adapt was error and it was prejudicial. Defense counsel should have the opportunity explain why the objection was not made. We preserve to the defendant the right to address this issue in a postconviction proceeding.

AFFIRMED.